

THE CLAYTON ACT AMENDMENTS OF 1987
(Railroad Antitrust Immunity)

HEARING

BEFORE THE

SUBCOMMITTEE ON ANTITRUST,
MONOPOLIES AND BUSINESS RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

S. 443

A BILL TO AMEND THE CLAYTON ACT REGARDING DAMAGE LIABILITY
AND COVERAGE

MAY 13, 1987

Serial No. J-100-21

Printed for the use of the Committee on the Judiciary



U.S. GOVERNMENT PRINTING OFFICE

74-718

WASHINGTON : 1987

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

5521-57

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THE CLAYTON ACT AMENDMENTS OF 1987, S. 443 (Railroad Antitrust Immunity)

WEDNESDAY, MAY 13, 1987

U.S. SENATE,
SUBCOMMITTEE ON ANTITRUST, MONOPOLIES,
AND BUSINESS RIGHTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:07 p.m., in room SD-562, Dirksen Senate Office Building, Hon. Dennis DeConcini presiding.

OPENING STATEMENT OF SENATOR DENNIS DeCONCINI

Senator DeCONCINI. The subcommittee will come to order. I would like to welcome everyone here to the hearing this afternoon on S. 443, The Clayton Act Amendments of 1987.

S. 443 is the product of extensive hearings and negotiations on the captive shipper issue that occupied us in the last Congress. I believe that the problems faced by captive shippers were well documented during those hearings, and that S. 443 represents a fair and effective solution to those problems.

Opponents of this legislation have always been quick to point out that captive shippers have a remedy at the Interstate Commerce Commission, and that therefore application of the antitrust laws to railroads would be a needless and confusing step. I happen to disagree with that, but that is what we are here to discuss once again.

Government regulation of American railroads dates back to the 19th century. By the early years of this century nearly all aspects of railroading were pervasively regulated by the Interstate Commerce Commission. In order to make the regulatory structure work effectively, Congress wisely chose to exempt railroads from the injunctive relief provisions of the Clayton Antitrust Act. In 1922, the Supreme Court extended rails' antitrust immunity by barring private suits for damages.

But our attitude toward regulation has changed markedly over the last decade. By the mid-1970's, railroad bankruptcies were on the increase, and it was apparent that pervasive government regulation was a factor in rails' decline. Congress responded by deregulating the railroads to a large extent through the Railroad Revitalization and Reform Act of 1976, and the Staggers Rail Act of 1980.

Extensive regulation of railroads by the ICC is gone, but rails' immunity from the antitrust laws still stands as a relic of the old

regulatory structure. I do not believe that this bill unfairly singles out railroads or intrudes in any way on the jurisdiction of the ICC.

It has never been my desire to persecute the railroads. A healthy and competitive rail system benefits all of us. I am not convinced at this point that there are competitive problems in these other regulated industries that are severe enough to require legislation.

Finally, I believe that S. 443 will in no way hamper the ability of the ICC to continue carrying out its duties under the Interstate Commerce Act. A primary duty of the ICC is determining whether a rate that is subject to its jurisdiction is reasonable. A rate that is the result of a lawfully obtained market power must be regulated by the ICC. S. 443 will not change that. But a rate that is the result of unlawfully obtained market power should be proscribed by the Antitrust laws. S. 443 would accomplish that.

I look forward to our witnesses. But first I wish to place in the record several statements along with the text of S. 443.

Senator Metzenbaum was going to try to be here this afternoon and was unable to be here. So I will have, without objection, his statement go into the record.

And also Senator Strom Thurmond, who wanted to have a statement inserted into the record, will also appear without objection.

Senator Simpson, wanted to be here this afternoon, was held up on the floor. I think he still is, and the record will remain open for two weeks for other statements to be submitted.

[Aforementioned material follows:]

OPENING STATEMENT OF SENATOR HOWARD M. METZENBAUM

The average consumer takes railroads for granted, but more than one-third of all freight transported in this country is carried by rail. The freight moved in this way includes wheat, coal, chemicals, and lumber—products that feed, house, and keep warm our Nation's citizens. It is beyond dispute, therefore, that railroads serve an extremely valuable function in the distribution of goods to consumers.

This hearing addresses important questions about the accountability of railroads for anticompetitive behavior. For example, if two or more railroads conspire to commit a per se violation of the antitrust laws, could a person harmed by the conspiracy sue in court to recover its harm? Under the "Keogh" doctrine, the answer in many cases would be "no."

Furthermore, if rail were the only economical way for a shipper to transport coal or wheat, would that shipper be held "captive" to monopoly rates dictated by the railroad? Given the inactivity of the Interstate Commerce Commission, the answer to that question may be "yes."

Both these scenarios could lead to higher transportation costs and, therefore, higher prices for food, housing, and heat and other products and services.

I hope that this hearing will help shed light on the adequacy of remedies available to persons aggrieved by anticompetitive behavior of railroads. I commend my colleague, Senator DeConcini, for introducing legislation that addresses these important issues.

OPENING STATEMENT OF SENATOR STROM THURMOND

Mr. Chairman: As you know, the Committee held extensive hearings on the predecessor of this bill in the last Congress. In those hearings, we heard of the problems faced by some shippers of bulk commodities on railroads. The shippers in question are located on or near the tracks of only one railroad and are thus "captive" to that railroad in the sense that they have no competitive alternatives.

Some of the concerns expressed by the shippers relate to the pricing practices of the railroads under deregulation. Since the passage of the Staggers Act in 1980, railroads have had certain flexibility to charge different prices to shippers in different markets. This "differential pricing" flexibility, which is limited to an extent by re-

maintaining I.C.C. regulations, was an important, intended result of railroad deregulation.

This hearing relates to immunities from certain antitrust remedies enjoyed by the railroads. The question before us is whether those immunities should be removed so that shippers may seek a full range of antitrust remedies against railroad pricing that is proven to violate antitrust principles.

In previous hearings, the Administration expressed concerns about the impact of this bill on the national transportation policy, especially if it would somehow discourage differential pricing. A question I have is related to dual jurisdiction. This bill would seem to subject the railroads to two regulatory schemes—one at the I.C.C., and the other in the courts. It disturbs me that railroads might be faced with inconsistent or conflicting outcomes and remedies in the I.C.C. and the courts in matters involving essentially similar facts.

I would like to hear some discussion of the dual jurisdiction problem in our hearing today.

Mr. Chairman, I join you in welcoming our witnesses and I look forward to their testimony. Thank you.

OPENING STATEMENT OF SENATOR ALAN K. SIMPSON

I commend Senator DeConcini for presiding at this Hearing on S. 443, the Clayton Act Amendments of 1987. Senator DeConcini has given us a splendid effort on this legislation and he has pressed on with the bill once again in the 100th Congress—that is his way.

I joined Senator DeConcini as a cosponsor of this measure. I think it is important to restore some badly needed competition to the railroad industry's hauling of certain bulk products like coal, soda ash, chemicals, or forest products. Shippers of bulk products become "captive" when they are served by one rail line and when rail service is the only feasible means of shipping their product.

When we created the Staggers Rail Act and effectively deregulated the railroads, there was recognition of the existence of captive shippers and so it was provided that captive shippers would be protected against unfair rates. The Interstate Commerce Commission was directed to balance the interests of a healthy railroad system with the equally important need to protect shippers from monopolistic practices.

I think it is great what the Interstate Commerce Commission has done under the guidance of Heather Gradison. I have come to know Chairman Gradison and admire her for the work she is doing.

But let me add that Chairman Gradison's predecessors were not always so admired. They did not always do a tremendous job. As a result of these previous practices of the ICC, tremendous burdens were placed upon those who complained about captive shipping rates—and this legislation is intended to help these shippers get back to the original intent of the Staggers Rail Act protection provisions.

We in Wyoming have seen the problems caused by captive shippers who are unable to access the judicial system for relief. We have seen the difficulties caused in both the trona mines and the coal mines.

And we have seen the positive effects of competition which this legislation would help promote. For a number of years, the Burlington Northern Railroad was the "only game" in town for hauling coal out of the Powder River Basin. When the Chicago Northwestern line came in and provided competition, Burlington Northern rates dragged immediately. It was a dramatic example of the positive effects of competition and I believe that this legislation will help promote that goal.

We are not out to control or destroy railroads, but are simply looking for fairness and we have not had fairness before with respect to the interpretation of the Staggers Rail Act. I am not interested in preventing the railroads from getting a fair return on their investments. They deserve it.

This bill simply provides an incentive for them to compete fairly in the market place and helps cut down these costs to shippers and consumers by providing a judicial remedy if our courts adjudicate that a railroad was involved in monopoly practices. This is no more than what is required of all other businesses.

I appreciate the interest of Senator DeConcini in this matter and the interest of the Department of Justice and the Interstate Commerce Commission. I will be interested, too, in hearing what administrative and industry proposals may be available to resolve these issues. I look forward to working with all the parties represented here today.

A BILL To amend the Clayton Act regarding damage liability and coverage

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Clayton Act Amendments of 1987".

SEC. 2. (a) Section 4 of the Clayton Act (15 U.S.C. 15) is amended by adding at the end thereof the following new subsection:

"(d) A common carrier by rail shall not be immune from damages under this section."

(b) The proviso of section 16 of the Clayton Act (15 U.S.C. 26) is amended by inserting "(other than a common carrier by rail)" after "common carrier".

Senator DECONCINI. I want to thank my friend, Congressman Synar, for his steadfastness and leadership in the House on this legislation. And we are very pleased to have you here, Congressman, I apologize for keeping you waiting.

Mr. SYNAR. Thank you, Dennis.

Senator DECONCINI. Please proceed.

STATEMENT OF HON. MICHAEL SYNAR OF OKLAHOMA, U.S. HOUSE OF REPRESENTATIVES

Mr. SYNAR. My statement will be short. As you know I have introduced the identical bill to yours, H.R. 941 in the House. And all I would like to do is today spend a few minutes discussing the philosophy behind the legislation.

In 1980, Congress passed the Staggers Rail Act. And the purpose of the Staggers Act was to "allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail."

Now that is an admirable goal, and in many respects it has been achieved.

But Congress has long recognized that there must be some form of judicial oversight to ensure that the free market is fully competitive. The antitrust laws must exist as a backstop to restrain the behavior of those firms that legitimately gain monopoly power. Without these laws, monopolists are able to charge artificially high rates for their products and services.

Now that is the situation that exists in the railroad industry today. The railroads do have monopoly power in many areas of the country, largely because of the heavy involvement of the Federal government in creating a viable railroad industry in the 1800s. The Staggers Act virtually eliminated the ability of the Interstate Commerce Commission to control the rates charged by those railroads having monopoly power.

Yet two historical anachronisms, the Keogh doctrine and the Section 16 of the Clayton Act, prevent captive shippers from using the antitrust laws to make those rates competitive. The result is that captive shippers are powerless to respond to excessive rates that are charged when no transportation alternative exists.

The railroad industry argues that this bill creates a system of dual rate regulation that will subject the railroads to treble damages for rates that have been approved by the ICC. That argument, I feel, either assumes that the Staggers Act had no effect on railroad deregulation, or it assumes that if the ICC retains any vestige of regulatory authority, that the railroad industry should be

immune from the antitrust laws. I think both are fatally flaws assumptions.

First, the Staggers Act had a tremendous effect on the ability of railroads to set rates outside the jurisdiction of the ICC. One provision of the Staggers Act demonstrates that point, though there are others that I could cite. The Staggers Act presumptively assumes that a rate is competitive if it is less than 180 percent above the railroad's variable cost. Thus, the ICC has no jurisdiction over a rate below that level even if it is inflated due to the monopoly power of the railroad.

Second is the argument that any ICC rate regulation should immunize the railroads from the antitrust laws. That argument fails to recognize that even if the ICC did retain authority to reduce certain rates, such authority is not incompatible with granting the Federal courts the authority to require competition.

The ICC addresses the problem of monopoly power, albeit in limited ways, by requiring rate reductions. The antitrust laws force monopolists controlling essential facilities to set rates consistent with competition on those facilities, or open up those facilities to actual competition. These are two fundamentally different means of lowering excessive rates. They exist concurrently in many other industries, and should both apply to the railroads.

The railroad industry has argued that they are being singled out for separate discriminatory treatment under this legislation. I find this an odd argument, given the preferential treatment this industry has enjoyed in the last six years following the deregulation. Its fallacy is most apparent when viewed in terms of the motor carrier industry.

The Keogh doctrine and Section 16 of the Clayton Act theoretically insulate motor carriers from antitrust suits filed by shippers, for anticompetitive rates on file with the ICC. But the trucking industry, like the railroads is essentially deregulated. And unlike the railroads, there is little economic barrier, and no regulatory barrier, to entering the trucking business. Trucks do not maintain control over "essential facilities." Competition is alive and well on our nation's interstate highways.

I think the bottom line of this whole discussion today is this, is that someone is going to have to convince me that there is a reason why the railroads are exempt from the antitrust laws of this country. I have been, as you have, Dennis, involved in this issue for a number of years. And to this day, I have not heard a legitimate argument on why they should be exempt.

I welcome the support today of the chairwoman of the Interstate Commerce Commission for the repeal of the Keogh plan doctrine, and I look forward to working with her to clarify our intent on the repeal of Section 16 of the Clayton Act. I also appreciate your work for sponsoring this important legislation in the Senate, and I appreciate the opportunity to be here today.

Senator DECONCINI. Congressman, thank you. And I have the same question you do, as to why we should continue to provide such an exemption. I appreciate your leadership and your testimony today. I still have some hope that the railroads will see an opportunity to benefit from this legislation. We have already made some substantial changes from where you and I started several

years ago. I want to thank you very much for being with us today and taking the time to come over and start us off again.

Mr. SYNAR. Thank you, Dennis.

Senator DECONCINI. I also want the record to show my appreciation to the Senator from Ohio, Senator Metzenbaum, for scheduling these hearings and permitting me to chair them today.

Our next witness will be Mr. Charles F. Rule, Assistant Attorney General. Mr. Rule, I want to thank you for providing the time for this committee. I understand from talking to my staff that you have a lot of different testimonies that you are required to give and we are cognizant of those demands.

And it was not out of an ego trip or any such thing that we had to have you here. We finally concluded that if we were going to try to move this bill, which I would like to do, of course, we really needed the Justice Department to have a statement. And I want you to know that I greatly appreciate your being able to do that in a short period of time.

**STATEMENT OF HON. CHARLES F. RULE, ACTING ASSISTANT
ATTORNEY GENERAL, ANTITRUST DIVISION**

Mr. RULE. Thank you, Senator. It is a pleasure to be here, and I was happy to come up and talk about this bill. I have an 11-page prepared statement that I understand will be placed in the record.

Senator DECONCINI. Without objection, it will appear in the record.

Mr. RULE. I will simply summarize this afternoon the remarks that I was going to make.

Let me say, first of all, that you are to be commended, as well as Congressman Synar, for the changes in the efforts to address some of the concerns that have been raised by the Department of Justice in the past. It is certainly a movement in the right direction.

This bill differs in approach from some of the past versions. Nevertheless, for the reasons that I will explain, the Department has concluded that it still cannot support the bill.

The bill, S. 443, has two parts, as you know. The first would repeal the so-called Keogh doctrine. The second would repeal the so-called ICC proviso of Section 16 of the Clayton Act. First, let me turn to the repeal of the Keogh doctrine.

In our view, simply eliminating the Keogh doctrine would not provide captive shippers with useful remedies beyond those that they currently have. The Keogh doctrine, only provides railroads with immunity from private, treble damage, antitrust suit actions, based on the charging of collective rates subject to ICC review.

Keogh precludes damage recovery where the plaintiff claims that the defendant's approved tariff rates or charges were established as a result of an antitrust violation. Even if Keogh were reversed, such a violation would be difficult to show under applicable antitrust precedent in a typical captive shipper situation. Charging monopoly rates, by itself, does not violate the antitrust laws.

To the extent the courts mistakenly assume that S. 443 provides a more lax antitrust standard in the captive shipper context, the contemplated damage remedy could enmesh courts and juries in the question of what rates are reasonable under the current Inter-

state Commerce Act regulatory scheme in order to determine liability and assess damages against sole facility railroads in the captive shipper context.

The opportunity for confusion and conflict regarding what rates such a railroad "should charge" is manifest. The reasonable rate problem the courts would face in a damage action, were Keogh to be repealed, would be presented even more starkly by S. 443's proposal for injunctive relief under the antitrust laws for captive shippers.

The Department cannot support this provision because it would require the courts, in granting injunctive relief, to regulate rates and charges in what essentially would be actions for regulatory relief brought under the antitrust laws. There is already in place a regulatory scheme designed to provide such relief under the Interstate Commerce Act.

As then Assistant Attorney General Douglas H. Ginsburg stated in his June 5th, 1986 testimony, the Department "would oppose repealing the proviso to Section 16 because its repeal would require courts to determine and continually supervise proper rates and charges in granting injunctive relief."

However, becoming regulators of sole facility railroads would be an extremely difficult undertaking for federal district court judges who lack the ICC's background and expertise in the operation and financial management of railroads. Moreover, creating a second regulatory mechanism in the federal judiciary to deal with captive shipper concerns is likely to lead to confusion and inconsistent results among the numerous courts, and between the courts and the ICC.

The Department of Justice, of course, is most sensitive to antitrust exemptions or partial exemptions. But Congress' decision to date not to make the antitrust laws fully applicable to railroads is not without parallel and is not necessarily inappropriate. Congress often has exempted, either explicitly or implicitly, regulated industries from the full application of the antitrust laws, precisely so that the courts will not be called upon to duplicate, second-guess or interfere with the efforts of expert regulatory agencies.

We endorse Congress' increasing reliance on competition and the antitrust laws rather than unnecessary economic regulation in many industries, and particularly in transportation. But Congress has so far left in place administrative regulatory authority over the activities that S. 443 would expose to antitrust review in the courts. Accordingly, Congress should continue to look to the ICC, or to its successor agency, to deal with the issues raised by captive shippers.

Under the Interstate Commerce Act, captive shippers currently have several ways of obtaining relief from the rates they believe to be unlawful and unfair.

While we are aware of past criticism of the ICC's implementation of these provisions, we believe the agency has demonstrated its willingness to try to deal effectively with captive shipper concerns. In particular, the ICC has promulgated regulations that should reduce significantly the burden on shippers seeking to obtain relief under the market dominance and reciprocal switching provisions of the Staggers Act.

In sum, Mr. Chairman, while the Department of Justice very much appreciates the attention that the drafters of S. 443 have given to the concerns with captive shipper legislation that we previously have expressed, we cannot yet support enactment of this bill.

Mr. Chairman, that concludes my remarks. I would be happy to answer any questions that you might have.

[Statement follows:]

STATEMENT OF

CHARLES F. RULE
ACTING ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to present the views of the Department of Justice on S. 443, the "Clayton Act Amendments of 1987." S. 443 is intended to provide relief to so-called "captive shippers"--that is, shippers who must look to a given railroad for freight transportation services because they lack suitable alternative transportation choices. While this bill differs in approach from other similarly-intended bills that the Department previously has opposed, the Department of Justice, for the reasons I will explain, cannot support it.

The Department has previously stated its opposition to other legislative proposals that would have created special new causes of action under the antitrust laws to attempt to deal with the concerns raised by captive shippers. 1/ Previous bills differed from S. 443 in that they took a more obviously regulatory approach. For example, S. 447, as introduced during the 1st session of the 99th Congress, would have created a new antitrust violation where a rail carrier denied to any shipper or another rail carrier the use on reasonable terms of a so-called "sole railroad facility" for the shipment of a bulk commodity. H.R. 1140, as reported during the 2d session of the

1/ See Statement of Douglas H. Ginsburg, Assistant Attorney General, Antitrust Division, concerning H.R. 1140 before the Subcomm. on Commerce, Transportation and Tourism of the House Comm. on Energy and Commerce, June 5, 1986.

last Congress, similarly would have established antitrust liability if such a denial had the "effect of monopolizing." 2/

The Department's opposition to these proposals was based in large part on our view that it is not clear that there is any significant captive shipper problem that cannot more appropriately be remedied by existing statutes and administrative procedures. We pointed out that bills such as S. 447 and H.R. 1140 would have imposed an extensive new regulatory regime on an industry that only recently has begun to enjoy the benefits of deregulation. We explained that, whatever their extent, captive shipper concerns should best be left to the regulatory expertise of the Interstate Commerce Commission (or a successor agency), rather than given to the courts to resolve in the context of a new antitrust remedy. One of the problems we identified with the premises of many proposals was the assumption that a competitive problem exists whenever only one rail line is available to a shipper, without consideration of other nonrail transportation options or factors such as source competition that would negate or ameliorate a problem.

2/ "Effect of monopolizing" was defined in H.R. 1140 to mean "prices, rates, or other conditions of service resulting from the use of market power, however obtained, to establish such prices, rates, or conditions, that could not otherwise be established if effective competition existed with operators of rail or nonrail modes of transportation between the terminal points of the sole railroad facility involved."

On its face, S. 443 appears to be a different, less regulatory bill. It contains only two short provisions that would amend the Clayton Act to permit private antitrust damage actions and private antitrust actions for injunctive relief against railroads. Indeed, in his remarks accompanying the introduction of S. 443, Senator DeConcini stated that its sole purpose is to subject railroads to the same antitrust rules that are applicable to other industries. 3/

Section 2(a) of the bill, which permits private damage actions against railroads under section 4 of the Clayton Act, is intended to overturn the so-called Keogh doctrine as it applies to railroads. Keogh v. Chicago and Northwestern Railroad 4/ held that where the ICC had approved as reasonable and nondiscriminatory rates filed by a group of carriers, a shipper could not recover damages in an antitrust action even if those rates were the product of a conspiracy to fix prices.

Keogh has little to do with the concerns of captive shippers, however. While the Department might not object to a legislative reversal of the Keogh doctrine--especially as it applies in cases involving horizontal agreements among

3/ See 133 Cong. Rec. S1614 (daily ed. Feb. 3, 1987).

4/ 260 U.S. 156 (1922).

competitors--such a reversal alone probably would do little to address the concerns of captive shippers. 5/

Keogh precludes damage recovery where the plaintiff claims that the defendant's approved tariff rates or charges were established as a result of an antitrust violation. Even if Keogh were reversed, such a violation could be difficult to show under applicable antitrust precedent in a typical captive shipper situation. Charging monopoly rates itself does not violate the antitrust laws. 6/ Rather, in order to prevail on a claim of monopolization in violation of section 2 of the Sherman Act, a plaintiff must prove both (1) that the defendant possesses monopoly power in the relevant market; and (2) that the defendant unlawfully acquired or maintained that power, as distinguished from achieving it through a superior product, business acumen, or historic accident. 7/ The second, or so-called "bad acts" requirement, may or may not be present in captive shipper situations. To the extent the courts

5/ In an amicus brief filed in Square D Company v. Niagara Frontier Tariff Bureau, 106 S. Ct. 1922 (1986), the United States urged the Supreme Court to overrule Keogh. The Court reasoned, however, that whatever the merits of the Keogh doctrine, its reversal was a matter for Congress to consider. Square D, like Keogh, involved alleged horizontal price fixing rather than unilateral action by a single firm as contemplated by S. 443.

6/ See Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980).

7/ See United States v. Grinnell Corp., 384 U.S. 563, 570-571 (1966). See also Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

mistakenly assume that S. 443 provides a more lax standard for the bad acts requirement in the captive shipper context, the contemplated damage remedy could enmesh courts and juries in the question of what rates are reasonable under the current Interstate Commerce Act regulatory scheme in order to determine liability and assess damages against sole facility railroads in captive shipper contexts. The opportunity for confusion and conflict regarding what rates such a railroad "should" charge is manifest.

The "reasonable rate" conundrum courts would face in damage actions against sole facility railroads were Keogh repealed would be presented even more extensively by S. 443's proposal for injunctive relief under the antitrust laws for captive shippers. Section 2(b) of the bill would repeal the proviso to section 16 of the Clayton Act ^{8/} that currently denies injunctive relief to private parties against common carriers subject to the jurisdiction of the ICC insofar as it applies to railroads. Basically, the Department opposes this provision because it could require the courts, in granting injunctive relief, to regulate rates and charges in what essentially would be actions for regulatory relief brought under the antitrust laws. There is already in place a regulatory scheme designed to provide such relief under the Interstate Commerce Act. The ICC is far better equipped than are courts effectively to resolve captive shipper concerns.

^{8/} 15 U.S.C. § 26.

We very much appreciate the sensitivity of the sponsors of S. 443 to reimposing onerous regulatory provisions on railroads in an attempt to deal with the captive shipper issue. But although S. 443, unlike earlier bills, would not on its face impose new substantive standards to be applied to rail carriers in antitrust cases, its practical effect would be to raise many of the same concerns with new railroad regulation by the judiciary that we have voiced in previous testimony on captive shipper legislation. Indeed, in his June 5, 1986, testimony, then Assistant Attorney General Ginsburg stated that the Department "would oppose repealing the proviso to section 16 because its repeal, like other provisions of H.R. 1140, would require courts to determine and continually supervise proper rates and charges in granting injunctive relief."

Essentially, by authorizing antitrust courts to issue injunctions in private cases, S. 443 would create a judicial regulatory scheme, duplicating that already in place in the Interstate Commerce Act, to deal with captive shipper concerns. Such a scheme is not only unnecessary, but also inherently problematic. Becoming regulators of sole facility railroads would be an extremely difficult undertaking for federal district court judges, who lack the ICC's background and expertise in the operation and financial management of railroads. Courts generally are not called upon to undertake such regulatory exercises, which are more properly characterized as an administrative rather than judicial

function, 2/ and we fear that doing so could strain the federal judiciary beyond tolerable limits.

Creating a secondary regulatory mechanism in the federal judiciary to deal with captive shipper concerns is also likely to lead to confusion and inconsistent results--and may in fact be counterproductive. Courts might well be called upon to second-guess ICC determinations, and some courts might adopt approaches or decisions that differed from those applied by other courts--even with respect to the same railroads. Moreover, courts addressing particular complaints under the antitrust laws might not take into consideration the Staggers Act's overall regulatory pricing policy, which contemplates differentiation between rates to shippers who have access to competing transportation alternatives and to those who do not. That rate differentiation is important because, to a significant degree, railroads are able to recover part of their fixed costs through higher rates to captive shippers. In the absence of their ability to continue to do so, railroads might return to the pre-Staggers Act environment in which their rates were inadequate to cover their costs. That situation threatened the continued viability of our nation's rail system and was, we believe, substantially improved by the Staggers Act.

2/ See Booth v. American Telephone & Telegraph Co., 253 F.2d 57, 58 (7th Cir. 1958), citing Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246, 251 (1951).

The Department of Justice, of course, is most sensitive to antitrust exemptions or partial exemptions. But Congress' decision to date not to make the antitrust laws fully applicable to railroads is not inappropriate or without parallel. Congress often has exempted, either explicitly or implicitly, regulated industries from the full application of the antitrust laws precisely so that the courts will not be called upon to duplicate, second-guess, or interfere with the efforts of expert regulatory agencies. ^{10/} We endorse Congress' increasing reliance on competition and the antitrust laws rather than unnecessary economic regulation in many industries, and particularly in transportation. But Congress has so far left in place administrative regulatory authority over the activities that S. 443 would expose to antitrust review in the courts. Accordingly, Congress should continue to look to the ICC or to its successor agency to deal with the issues raised by captive shippers.

Under the Interstate Commerce Act, captive shippers have several ways of obtaining relief from rates they believe to be unlawful and unfair. The key remedies provided to shippers

^{10/} The courts themselves have recognized that subjecting firms to potentially conflicting antitrust and regulatory requirements would not further the fundamental goals underlying the antitrust laws. For example, the so-called "state action" doctrine evolved in the courts largely to avoid conflicts between the antitrust laws and state policies substituting regulation for competition. See, e.g., *Southern Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48 (1985).

under that Act are the ability of the ICC to impose maximum rate regulation under the market dominance provisions of 49 U.S.C. § 10709, and to provide competitive access under the reciprocal switching or terminal facility provisions of 49 U.S.C. § 11103. Similar results may be achieved in some circumstances under the ICC's authority to prescribe through routes and joint rates. 11/

While we are aware of past criticism of the ICC's implementation of these provisions, we believe the agency has demonstrated its willingness to try to deal effectively with captive shipper concerns. The ICC has promulgated regulations that should reduce significantly the burden on shippers seeking to obtain relief under the market dominance and reciprocal switching provisions of the Staggers Act. In Ex Parte 320, the Commission revised its market dominance guidelines, shifting to the railroads the burden of proving the existence of effective product or geographic competition. 12/ In Ex Parte 445 the Commission adopted new rules to be used in competitive access proceedings. 13/ In reciprocal switching or joint rate

11/ Should the ICC be sunsetted, as the Administration has proposed, its authority under these provisions would be transferred to a successor agency.

12/ Ex Parte 320 (sub-no. 3), Product and Geographic Competition, 50 Fed. Reg. 46,189 (November 6, 1985).

13/ Ex Parte 445 (sub-no. 1), Intramodal Rail Competition, 50 Fed. Reg. 46,066 (November 6, 1985). The Commission's action in Ex Parte 445 was recently affirmed in Baltimore Gas & Elec. Co. v. United States, No. 85-1761 (D.C. Cir., April 21, 1987).

cancellations, the rules preclude consideration of product competition, require the railroad to demonstrate source competition by clear and convincing evidence, and make irrelevant the issue of the railroad's revenue adequacy. In Ex Parte 347, 14/ the Commission issued coal rate guidelines providing that coal shippers should not be required to pay more than is necessary for the rail carriers involved to earn adequate revenues. The Commission has reviewed its revenue adequacy criteria in order to assure that captive shippers' complaints are resolved under more realistic revenue adequacy guidelines.

Taken together, the ICC's recent actions should substantially liberalize the conditions under which it will grant relief to captive shippers. While the effectiveness of the new rules cannot be known with certainty at this time, these actions demonstrate the ICC's ability and willingness to address captive shipper issues. In light of the severe disadvantages of creating a second regulatory apparatus to deal with these issues, it would be unwise for Congress to enact new legislation in this area.

For all of these reasons, while the Department of Justice very much appreciates the attention that the drafters of S. 443 have given to the concerns with captive shipper legislation

14/ Ex Parte 347 (sub-no. 1), Coal Rate Guidelines, Nationwide, 50 Fed. Reg. 35,562 (September 3, 1985).

that we previously have expressed, we cannot support enactment of this bill.

Mr. Chairman, that concludes my prepared remarks. I would be happy to address any questions that you or other members of the Subcommittee may have.

Senator DECONCINI. Mr. Rule, thank you very much. I do have some questions. Let me first go to a question regarding, the Keogh doctrine.

You point out in your statement that the Keogh doctrine involves horizontal price fixing rather than the vertical activities that is really at issue in captive shipper situations. The horizontal price fix gives the conspiring parties the ability to control prices and keep it above a competitive rate; is that not true?

Mr. RULE. Yes, sir.

Senator DECONCINI. The Supreme Court has consistently held that monopoly power maintained in violation of Section 2, the so-called captive shipper situation, gives the monopolistic—the monopoly the very same ability to control prices as in the horizontal situation. Do you agree with that?

Mr. RULE. It is not the charging of a monopoly rate in the context of section 2, but rather the monopoly power and the acquisition or unlawful acquisition or maintenance of that power, that constitutes the violation.

Senator DECONCINI. Does it not seem to you, as it does to me, that if a violation of Section 1 produces a price and a person paying that price is able to sue, and if a violation of Section 2 produces the same price to the same injured party, that party should again be able to sue. And yet presently the injured party is precluded from bringing suit in most cases. I have trouble with that.

Mr. RULE. I understand that. Of course, currently under the Keogh doctrine parties cannot sue for collusively set rates where they are subject to ICC approval.

Senator DECONCINI. Does the ICC have jurisdiction here in this particular example?

Mr. RULE. The Supreme Court in the recent *Square D* case has said that those rates, even though they are only evaluated for not being too low or for being discriminatory, still provide the exemption. The Court has stated that it is up to Congress to repeal that doctrine.

Senator DECONCINI. So in most cases the ICC would not have jurisdiction under this example.

Mr. RULE. The concern would be if the antitrust laws began to assess damages for the simple charging of what the market will bear when an individual has market power or monopoly power. That would be a fairly fundamental change in the nature of what the antitrust laws do.

Generally, to the extent that they deal with above competitive level pricing, that occurs in the context of a joint agreement among competitors. What the law has generally been directed at in the section 2 context is to prevent the sort of conduct that allows the party to maintain or to acquire monopoly power, as opposed to the actual exercise of that power once he has it.

The problem with asking the courts to regulate that conduct or to assess damages on the basis of what is charged when one has monopoly power, is that it gets into the whole question of the courts setting rates because they have to determine what is reasonable. A party that charges above that reasonable rate, if I understand the intent of this bill, would be liable for three times the overcharge.

That is a fairly expensive, substantial penalty to impose on railroads. It is not something that is generally imposed on those who possess monopoly power outside the railroad industry.

Senator DECONCINI. Do you agree that it would be a constructive tool to get the railroads to grant someone else the use of their tracks, or to lower their rates themselves? Do you see a flood of litigation if this were enacted?

Mr. RULE. There could be, and I think there probably would be a number of suits filed. How successful they would be under the current state of the essential facility doctrine is debatable unless this bill were interpreted as somehow expanding substantive antitrust law, which I do not take to be the intent of the sponsors and which I think would be inappropriate if it was.

But assuming that such expansion is not, the sponsor's intent, the parties would have to establish the parameters of the essential facility doctrine. At that point I think the more relevant remedy provided would be the injunctive remedy provided in S. 443.

Senator DECONCINI. Very good. You testified before this committee in the past that the Justice Department generally opposes exemptions from the antitrust laws. Why should we not provide the maximum opportunity for rail rates to be set through competition, which is the purpose of this legislation as I perceive it. Would we not really be better off with rates set by competition and approved by the ICC, than we are under the present situation?

Mr. RULE. We agree with your concerns and your view that it is more appropriate to allow competition to set rates than to have regulators set rates. Certainly the Staggers Act was a move in that direction. The problem is the Staggers Act, for reasons that I think are quite appropriate, did not totally remove regulation of the rail industry.

One area where it did not remove regulation is in dealing with captive shipper problems. There are remedies that exist now under the ICC Act, and that the ICC can administer, that are designed to provide relief to captive shippers within the context of the overall objectives of the ICC Act.

The courts, on the other hand, would be dealing with specific facts in a specific case, and there would be a real risk that their decision there, or a multitude of decisions by different courts, could interfere with the overall goals of the ICC and indeed, could conflict with the decision by the ICC about what is best in a particular captive shipper's situation. That is different, for example, from what we said in the McCarron-Ferguson Act context.

Senator DECONCINI. Would you agree that this bill simply gives private parties, including shippers, the right to file suit for anti-trust violations?

Mr. RULE. That is certainly true, yes.

Senator DECONCINI. It would not really affect the existing law as to what constitutes a violation, correct?

Mr. RULE. That is true. I assume that is the intent, and I hope that is the way it is interpreted.

Senator DECONCINI. Yes, it is. Is it the process of what the courts might do in making their determination if a suit is filed which you have trouble with?

Mr. RULE. Well, let me clarify just one point. It is true that that would be the effect. There are many areas where there is either no regulation or where regulation does not reach a certain type of conduct. It is perfectly appropriate there to apply the antitrust laws, because there is no danger of a conflict between a regulatory scheme and competition or application of the antitrust laws.

Our concern here is that there are certain remedies that, in effect, embody, occupy the field, if you will, in terms of the captive shipper problem, that are administered by the ICC. Given that those remedies are there, there is an inevitable, inherent conflict between trying to apply the antitrust laws in that area and trying to apply the ICC Act.

Senator DECONCINI. Is it primarily the treble damages?

Mr. RULE. It is primarily the injunctive relief.

Senator DECONCINI. The injunctive relief. See, I am not sure I understand how S. 443 would possibly cause the courts to become involved in deciding whether a particular rate is reasonable or not. So you are not really saying that they would do that.

An antitrust violation occurs when a rate is set through anti-competitive conduct. In the antitrust context, whether a given rate is reasonable or not is really of little consequence.

Mr. RULE. That is true. But generally the charging of a rate or a price by a monopolist is not, in and of itself, a violation of the antitrust laws. It is the action that led to the acquisition or the maintenance of that monopoly power that violates the laws.

The problem occurs when you allow the courts to enter injunctions in essential facility cases, the nature of the relief being an order by the court that requires the parties to provide access to that essential facility on reasonable terms. What that generally requires is that the court supervise the rates that are charged by the railroad.

It is the injunctive relief that is entered that places the courts in the role of being a regulator.

Senator DECONCINI. Are you worried about a lower standard there that the court might use?

Mr. RULE. No, I am worried that, unlike many of the other situations where the essential facility doctrine is applied, in this case we already have a legal regime that deals with the problem of captive shippers and of providing access to that essential facility. That regime is the ICC Act.

Senator DECONCINI. Is it your opinion that that has worked well?

Mr. RULE. As we indicate in the statement, we recognize that there are a number of criticisms of the ICC. The ICC, I think, has undertaken a number of actions to try to address some of those criticisms. They have put into place some rules that frankly are more liberal, or more pro-shipper, if you will, than current antitrust rules.

The regime that is in place is more favorable to shippers than one can expect under the antitrust laws. But the problem is that, with courts applying these laws and entering injunctions, those injunctions may conflict with what the ICC decides is the best policy in a particular instance or for the rail industry overall.

Senator DECONCINI. In the case of the *United States v. Terminal Railroad Company*, the Justice Department brought the suit to

enjoin the monopolization of the railroad bridge across the Mississippi River to St. Louis, correct?

Mr. RULE. Right.

Senator DECONCINI. It seems to me that if the government can bring such a suit, and it can be handled by the courts without conflict with the ICC, then a private party can and should be able to bring such suit. But you think that is going to be detrimental?

Mr. RULE. Well, I think that the *Terminal Railroad* case is a very old case. It is a venerable case. It really is the beginning of the essential facilities doctrine in the Supreme Court. I am not enough of a railroad historian to know what the precise contours of ICC regulation were at the time.

I do know, however, given the extent of ICC regulation even after the Staggers Act, that there is a significant potential for conflict between entering orders, such as that entered in *Terminal Railroad*, and achieving what the ICC is mandated to achieve under the Staggers Act and its other statutes.

Senator DECONCINI. Is it fair to say that the Justice Department thinks that the ICC has operated or fulfilled its obligation or its mandate?

Mr. RULE. It is fair to say that they certainly have taken actions to address criticisms, and that it is a little too early, we think, to judge the effectiveness of those actions at this point.

Senator DECONCINI. Since the passage of the Staggers Act?

Mr. RULE. I am talking about several of the ex parte actions on market dominance and similar actions taken in the last two to three years.

Senator DECONCINI. Because I think that is one of the main reasons we are here.

Mr. RULE. I recognize that.

Senator DECONCINI. There is a big disagreement as to the ICC and whether it is doing what it is mandated to do. If I and others thought that they were doing it, then I do not think we would probably be here.

Mr. RULE. Right.

Senator DECONCINI. I do have some other questions, Mr. Rule, but we will submit them due to time and witnesses that are here. I do want to thank you very much for taking the time to be with us.

Mr. RULE. Thank you, Senator.

Senator DECONCINI. You've been very helpful, I appreciate it.

We now will have the Honorable Heather J. Gradison, the chairwoman of the Interstate Commerce Commission.

Ms. Gradison, your full statement will appear in the record. Thank you for being with us today.

STATEMENT OF HON. HEATHER J. GRADISON, CHAIRWOMAN, INTERSTATE COMMERCE COMMISSION, ACCOMPANIED BY DAN CAMPBELL, DEPUTY GENERAL COUNSEL, INTERSTATE COMMERCE COMMISSION

Ms. GRADISON. Good afternoon. Senator, it is good to see you.

Senator DECONCINI. Nice to see you.

Ms. GRADISON. It has been a year since we testified on your bill. Thank you for the opportunity to be here this afternoon to discuss S. 443, a bill entitled Clayton Act Amendments of 1987.

The bill is short and concise. It proposes to eliminate the Keogh doctrine and the prohibition against injunctive relief in the Clayton Act, so far as these rules concern rail carriers.

Before addressing S. 443 directly, I would like to summarize some of the Commission's recent actions. When we appeared before the committee last year there was a substantial difference of opinion over the effectiveness of the Commission's regulatory policies. We indicated that additional steps would be taken to ensure that Commission standards would reflect an even balance between our responsibilities to a sound rail system, and our mandate to protect captive shippers. The following summary is offered so that you may see that we have followed through on that commitment.

In 1986 the ICC began implementation of its new maximum coal rate guidelines. These were a regrettably long time in coming. But in its first application the Commission authorized a \$20 million refund to a Nebraska utility. In its second application just now decided, a refund of \$30 million has been rewarded.

And in yet another high profile coal dispute, the Commission has awarded a \$60 million refund to satisfy one of a series of complaints brought by the city of San Antonio. The remainder of the city of San Antonio disputes have been settled by the carriers for an additional \$50 million. Money that represents a clear judgment by the railroads that our coal rate guidelines put the carriers at risk. The city of San Antonio expressed its appreciation for the Commission's time, effort, patience and energy that we had dedicated to the case.

Coal shippers have been given leverage by these Commission decisions. Longstanding disputes are now being settled, in some cases with payment of sizable money damages. Coal is increasingly moving under contract, with shippers claiming savings in tens and hundreds of millions over the life of the contract.

These developments are the cumulative effect of the Commission's commitment to competitive entry and a maximum rate policy that effectively protects captive shippers. We are actively seeking to expand the availability and reduce the cost of our maximum rate protection.

In 1986 we opened a proceeding to ask for suggesting from shippers about streamlining our maximum rate cases. Simplified proposals are now out for comment and we are already using them. Two years ago much of the burden of proof in complicated market dominance disputes was shifted to the railroads. Combined with this shifted burden to the rails, new non-coal rate guidelines for small shippers will make rate relief readily accessible for all captive shippers regardless of size.

For the past 18 months the Commission has been actively reviewing, fine-tuning if you will, other important regulations. Rate relief was given across the board and an adjustment to our rules for price indexing. In October 1986, the Commission ordered a rollback in rates that had been automatically increased under a price index provision of the Staggers Act, but which had not decreased when the cost of railroading went down. So we rolled those rates back.

In addition, the Commission revised its revenue adequacy standards in response to valid criticism of handling of deferred taxes and other accounting issues. The Commission's revenue adequacy standards have now been revised and our new rules are fully supported by studies done by the GAO and the Railroad Accounting Principles Board.

The Staggers Act recognized that competition was a partner with rate freedom, and the Commission concurs. The ICC actively promoted competitive access in 1986. We have been an aggressive supporter of new competition for Powder River Coal, twice approving in 1981 and 1986 the expansion of a second railroad into the region. These decisions have had favorable implications for energy pricing throughout the nation.

New construction was also authorized to coal reserves in Montana and New Mexico. The Commission approved trackage rights making the Soo Line the new competitive force for traffic flowing through Detroit, Michigan. The Commission has granted trackage rights to the DRGW and the MKT to enhance competitiveness in the central states corridor.

In the first of several applications of our new competitive access rules, the Commission suspended cancellations of joint rates. I would add here that our competitive access rules have just been upheld in the court. We viewed this as an important win because it demonstrates once again that the Commission has implemented the access provisions of the Staggers Act in accordance with its framers' intent.

Despite an admirable record on competitive access, criticism centers on one decision in which we denied mandatory switching and mandatory trackage rights to a shipper. The decision found that no abuse had occurred. This was a factual determination made on an extensive record.

What we saw when we looked was a shipper that was expanding its market and its reliance on the service of the very carrier it sought to penalize. We could not find any record for granting relief, except the belief of the shipper that it would be better off with a second carrier. We think Congress rejected a mandatory two-railroad policy in 1980. We know that the rail and shipper parties to our new access rules rejected it in 1985, and we did not reverse it in this isolated case.

The Commission has been working hard to fulfill its mandate under the Interstate Commerce Act. In 1986 we issued 14,154 procedural and substantive decisions for all modes. Approximately 13,000 new applications were brought before the Commission, most of which were decided within six months of receipt.

Of the more than a million tariffs filed, almost 79,000 were filed by rail carriers. Shipper complaints and protests against new rail rates numbered no more than two dozen out of 79,000 filed before us. The backlog of rate cases is half of what it was 15 months ago. The Commission has energetically encouraged parties to settle their differences.

Where final determinations have been made the Commission, we have ordered reparations for shippers four out of five times. No complaints against reasonableness of existing rates, and only one protest against a new rate have been filed in 1987.

I bring all of this to the picture to say that a year ago we had to dig to the bowels of the building to find out what was there. Today I have stated what we have found and what we have done with it. It has taken a regrettably long time to move the Commission to move the cases. We are moving them. We have not won all of our cases in the court. We have won the major ones, the coal rate guideline, the Ex Parte 445, Sub 1 access rules, the framework that we use to then make the determinations.

Let me turn now to your bill, S. 443. The bill under consideration would first amend Section 4 of the Clayton Act, adding a new subsection stating that a common carrier by rail shall not be immune from damages under this section. We understand that the intent of this provision is the elimination of the Keogh doctrine.

The Commission has supported the elimination of the Keogh doctrine in court proceedings, and a majority of the Commission continues to believe that its application in private antitrust suits against rail common carriers is unnecessary. You do not need the Keogh doctrine.

S. 443 will also amend Section 16 of the Clayton Act so as to repeal its application to rail carriers. Repeal of this section is not inconsistent with the elimination of the Keogh doctrine, but it does require careful analysis. And I share Mr. Rule's concern that he just stated while he was testifying. We think Section 16 should act only as a divider between what should be done by the courts and what should be done directly through regulation.

On the other hand, we recognize that rail defendants have every incentive to press for a far broader interpretation, one that might shield them from the consequences of behavior that the Commission neither authorizes nor condones. But since we believe that such a broad reading is incorrect, we are concerned that repeal might be interpreted as an invitation to overlapping and inconsistent jurisdiction.

Should the committee decide to pursue repeal of Section 16, and if, as we believe to be the case, the committee does not seek the creation of overlapping regulations, we request—we, the Commission, request the opportunity to assist the committee in clarifying and delineating the impact of the repeal.

That concludes my summary of my remarks. I would also like to introduce deputy general counsel, Dan Campbell, who is an attorney. I am not, and he may be more helpful to us in answering your questions.

[Statement follows:]

STATEMENT OF HEATHER J. GRADISON
BEFORE THE
SUBCOMMITTEE ON ANTITRUST
OF THE
SENATE JUDICIARY COMMITTEE
ON
S. 443, A BILL TO AMEND THE CLAYTON ACT

Thank you for the opportunity to be here this afternoon to discuss S. 443, a bill entitled "Clayton Act Amendments of 1987." The bill is short and concise. It proposes to eliminate the "Keogh" doctrine and the prohibition against injunctive relief in the Clayton Act, so far as these rules concern rail carriers.

The Commission appeared before the full Judiciary Committee to discuss the same general topic early last year. At that time, the Committee had under consideration a bill that the Commission believed to be an industry-specific antitrust remedy that would have created extensive overlapping jurisdiction between the courts and the ICC. In our judgment, the earlier bill was basically at odds with the Staggers Rail Act of 1980. S. 443 is a substantially different proposal. It is apparently responsive to concerns expressed before the full Committee last year. From the Commission's point of view it is a better bill.

Before addressing S. 443 directly, I would like to summarize some of the Commission's recent actions. When we appeared before the Committee last year there was a substantial difference of opinion over the effectiveness of the Commission's regulatory policies. We argued that Commission policy provided

protection from monopoly abuse, and we also indicated that additional steps would be taken to insure that Commission standards would reflect an even balance between our responsibilities to a sound rail system and our mandate to protect captive shippers. The following summary is offered so that you may see that we have followed through on that commitment. (1)

During the past year, the Commission decided several major maximum rate cases, a number of them also were settled, and our rate docket was reduced by half. Shippers have been awarded sizeable reparations where monopoly abuse has been found. These cases have demonstrated our commitment to achieving balance; shippers have gained leverage from these decisions, and are using that leverage in negotiating with rail carriers. The decisions also demonstrate that our coal rate standards are workable, undercutting frequent claims to the contrary. Further, we stated last year that we intended to offer additional standards for processing rate cases more quickly and inexpensively. We have now issued such proposals for public comment. We also ordered an across-the-board reduction of 1.1 percent in rail rates set under an indexing system created by the Staggers Act, and in the future, rates set under that system will go down as well as up

¹ The Commission is scheduled to present oversight testimony tomorrow before the House Subcommittee on Transportation, Tourism, and Hazardous Materials. That testimony goes into further detail about the Commission's activity over the past year. I would ask that copies of that testimony be appended to our statement here for inclusion in the record.

with commensurate changes in the costs of rail service. We reviewed our revenue adequacy standards, making substantial changes in the underlying methodology. And we have authorized competitive access through approval of new construction applications, terminal access, and joint operations. In short, 1986 was a year in which the ICC fine-tuned its regulations and demonstrated the balance that some said had been lacking in Staggers implementation.

Before passing from this brief summary to comment on S. 443, I would like to add that the Commission remains convinced that Staggers Act reforms have been enormously beneficial. Service has improved, renewed investment in the system has led to remarkable rehabilitation of track and plant, and the financing for these achievements have largely come out of savings from increasing productivity made possible by relief from unnecessary regulation. Improving productivity means that profitability does not have to come out of the customer's pocket. Rail transportation prices are lower today in real terms for almost all commodities, including bulk commodities. Prices are increasingly set through contract and agreement, and that has meant a decreasing role for the ICC in setting rates. There were only three complaints requesting the prescription of rates filed with the Commission in 1986, and there have been none so far in 1987.

S. 443

As noted above, the Commission believes that S. 443 differs

substantially from the bill under consideration in March 1986. S. 443 would first amend section 4 of the Clayton Act, adding a new subsection stating that a common carrier by rail shall not be immune from damages under this section. ⁽²⁾ The Commission understands that the intent of this provision is the elimination of the Keogh doctrine. ⁽³⁾ The Commission has supported the elimination of the Keogh doctrine in court proceedings, and a majority of the Commission continues to believe that its application in private antitrust suits against rail common carriers is unnecessary.

S. 443 would also amend section 16 of the Clayton Act so as to repeal its application to rail carriers, in essence providing for greater availability of injunctive relief in antitrust suits. ⁽⁴⁾ Repeal of this section is not inconsistent with the

² Section 4 of the Clayton Act (15 U.S.C. 15) provides that any person injured by anything forbidden in the antitrust laws may sue in the federal district courts, and may recover treble damages and the cost of suit including attorney's fees.

³ The so-called Keogh doctrine prohibits formulation of a damage complaint based on the discrepancy between a tariff filed at the Commission, and therefore presumptively lawful and reasonable, and a lower rate that might have been obtainable in the absence of some anticompetitive act. The doctrine was first annunciated in Keogh v. Chicago & Northwestern R. Co., 260 U.S. 156 (1922), and was recently affirmed by the Supreme Court. Square D Co. v. Niagara Frontier Tariff Bur. 90 L. Ed. 2d 413 (1986).

⁴ Section 16 of the Clayton Act (15 U.S.C. 26) provides for injunctive relief against threatened loss or damage from a violation of the antitrust laws. It contains a proviso stating that the section should not be construed to permit injunctive relief against any common carrier subject to the Interstate Commerce Act in respect to any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce

elimination of the Keogh doctrine, but it does require careful analysis.

In our view Section 16 of the Clayton Act as now written does not, or at least ought not, bar injunctive relief necessary to remedy anticompetitive conduct where relief under regulation is not available. ⁽⁵⁾ We think, instead, that the section stands, or should stand, only as a divider between what should be done by the courts and what is done directly through regulation.

In essence, the Commission sees Section 16 as a statutory statement analogous to the doctrine of primary jurisdiction under which courts seek to apportion remedial work between themselves and expert agencies, giving preference to the agencies where there is some specific statutory goal to be pursued. On the other hand, we recognize that rail defendants have every incentive to press for a far broader interpretation, one that might shield them from the consequences of behavior that the Commission neither authorizes nor condones. But, since we believe that such a broad reading is incorrect, we are concerned that a repeal might be interpreted as an invitation to overlapping and inconsistent jurisdiction. In other words, we are concerned that repeal might be seen as more than a rejection of excessive reliance on the proviso, and instead interpreted as

Commission. S. 443 would eliminate that barrier to injunctive relief.

⁵ A recent, and we believe proper, reading of the impact of the section 16 proviso can be found in Transkentucky Transportation Railroad v. Louisville and Nashville Railroad, 581 F. Supp. 759 (1983).

a suggestion that antitrust law should be given precedence over the Interstate Commerce Act.

Should the Committee decide to pursue repeal of Section 16, and if, as we believe to be the case, the Committee does not seek the creation of overlapping regulations, the Commission requests the opportunity to assist the Committee in clarifying and delineating the impact of repeal. On the other hand, if it is intended to give antitrust law precedence over the Interstate Commerce Act, or if it will otherwise inescapably intermix antitrust regulation with the rules and policies sculpted under the Interstate Commerce Act, the Commission would be opposed to its enactment.

That concludes the Commission's statement. We thank you again for the opportunity to present our views on this important matter.

STATEMENT OF HEATHER J. GRADISON, CHAIRMAN
BEFORE
THE SUBCOMMITTEE ON TRANSPORTATION, TOURISM,
AND HAZARDOUS MATERIALS
OF THE
HOUSE COMMITTEE ON ENERGY AND COMMERCE
ON
THE STAGGERS RAIL ACT OF 1980

MAY 28, 1987

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

Thank you for this opportunity to present the views of the Commission concerning the implementation and effects of the Staggers Rail Act of 1980. The specified goals of the Act are: (1) to assist the railroads of the Nation in rehabilitating the rail system in order to meet the demands of interstate commerce and the national defense; (2) to reform Federal regulatory policy so as to preserve a safe, adequate, economical, efficient, and financially stable rail system; (3) to assist the rail system to remain viable in the private sector of the economy; (4) to provide a regulatory process that balances the needs of carriers, shippers, and the public; and (5) to assist in the rehabilitation and financing of the rail system.¹

These goals stress the rehabilitation of the rail system--reflecting Congress' concern that a continuation of the status quo ante would have resulted in the loss of a viable private-sector rail system. Equally important, the Act sought reform of

¹ Pub. L. No. 96-448, sec. 3, 94 Stat. 1897.

regulation, both as to process and substance. A balanced climate was the goal. Railroads were to have the flexibility and incentive to perform efficiently, but the Commission was to insure that captive shippers were not abused by the new freedom. Measured by these purposes, there is little question that the Staggers Act is working successfully.

Railroad health has improved since Staggers, but profit still remains modest. This can be seen by a comparison of earnings with other industrial sectors. In 1986 rail transportation ranked 34th out of 40 major industrial sectors.² Over the last six years, the rails have ranked between 25th and 34th. While uninspiring, the performance exceeds that of the three years prior to Staggers when the rankings were between 33rd and 37th of what were then 39 categories. This marginal improvement has been sufficient to promote investment and innovation. Remarkably, the improvement has come from greater efficiency, not from higher prices -- the real cost of rail transportation is lower on average today than in 1980. (See Attachment B.)

What dispute there is over Staggers centers on the goal of a balanced regulatory process. The Commission has energetically

² Business Week, Annual "Corporate Scoreboard" various issues. Summary appended as Attachment A. Railroad earnings were adjusted to exclude large special charges to record major restructuring of operations (substantial reductions in personnel and writedowns of track and equipment). Otherwise, the railroad industry in 1986 would have ranked 38th out of the 40 major industrial sectors. If we were able to make similar adjustments to the earnings data of the other industrial sectors (pertinent data about their special restructuring charges were not available), the railroad industry ranking might be slightly higher (more unfavorable) than 34th in 1986.

addressed this issue in the 15 months that have passed since last presenting oversight testimony to your predecessor subcommittee. We believe that our efforts have been successful, and that a balanced climate exists. Railroads have been given the flexibility necessary to succeed, while captive shippers are being protected from monopoly abuse.

EFFECT OF THE STAGGERS ACT ON INDUSTRY PERFORMANCE

The differences in performance before and after Staggers are, in some ways, so striking that a comparison of a few years on either side of enactment can be eye-opening. Discussed below are a series of pertinent measures of this performance. The data indicate that profitability is up, but prices are down, because efficiency is up. This data is so critical to an understanding of the post-Staggers Act experience that a line-by-line review will be beneficial.

Line 1: Operating Income in 1985 dollars³ (\$000,000)

	77	78	79	80	81	82	83	84	85
(1)	568	659	1187	1706	1585	800	1963	2592	1748

Line 1 indicates that there has been some improvement in operating income. These numbers are adjusted for inflation but the years since 1983 reflect different assumptions regarding the

³ Source: Table 4 -- Class I Line-Haul Railroads, Condensed Income Statement, Financial Ratios and Employee Data, Interstate Commerce Commission Annual Reports.

accounting for track investment.⁴ The accounting change tends to overstate the after-Staggers improvement. But improvement is there. Moreover, the industry weathered the deep recession of the early part of this decade without negative numbers, and without further bankruptcies.⁵

Line 2: Rail Percent Return on Investment⁶

Line 3: Rail Profitability Compared to Other Industry⁷

	77	78	79	80	81	82	83	84	85
(2) Neg	1.45	2.70	3.85	3.78	2.00	4.25	5.57	3.76	
(3) Neg	.10	.33	.39	.84	.65	.60	.75	.61	

Line 2 confirms the improvement in earnings, but Line 3 demonstrates that -- even as improved by Staggers -- railroads are a low-earning industrial sector. During the late 1970's a period when interests rates were at an all-time high for this country, the railroads were earning rates of return near two percent. These figures are not aberrational, the entire decade of the 1970's looks about the same. For the post Staggers period, there is a marked improvement, almost doubling the

⁴ In 1983, the Commission required a change from a unique method of accounting for the expenditures on track structure to the use of the standard depreciation accounting. This change tended to boost the earnings by reducing the immediate annual track expense item.

⁵ While not reflected in the Line 1 data, 1986 rail earnings, adjusted for inflation, were \$493 million. The drop in earnings from prior years resulted from the large writedowns taken in 1986. Earnings before writedowns were \$1.8 billion.

⁶ Supra note 3.

⁷ Business Week, "Corporate Scoreboard," various years.

average return to something above four percent.⁸ But as the figures in Line 3 demonstrate, rail earnings never became more than a fractional part of the earnings for business generally.

Line 4: Average train miles per hour⁹
 Line 5: Ton-miles per train hour (000)⁹
 Line 6: Ton-miles per yard hour (000)⁹

	77	78	79	80	81	82	83	84	85
(4)	19.8	19.3	17.2	18.2	19.0	21.4	20.3	21.4	21.9
(5)	40.1	39.2	36.0	40.4	43.1	50.2	49.4	54.5	56.3
(6)	31.4	32.4	34.9	39.6	41.4	47.9	57.0	63.9	65.9

Earnings improvement, coupled with favorable tax treatment, has resulted in improvement in service. Slow orders, which restricted speed on 47,000 miles of track in the years just prior to Staggers¹⁰ have been reduced markedly, allowing average speed (Line 4) to increase from 17 miles per hour in 1979 to 22 miles per hour in 1985. This is almost a 30 percent increase. New investment and more flexible marketing rules have also produced heavier, more efficient trains. Revenue ton-miles per train hour (Line 5) have increased from 36 million in 1979 to 56 million in 1985 which is an increase of over 50 percent. Similarly, revenue

⁸ Coal stockpiling in anticipation of a possible mine workers strike dramatically increased earnings in the late quarters of 1984. Reductions from this stockpile correspondingly reduced earnings in 1985. Consequently, the rates of return for those two years might reasonably be leveled through averaging.

⁹ 1977-1978, "Operating Statistics Annual," Statement 100; 1979-1985, Railroad Annual Reports, (R-1), Interstate Commerce Commission.

¹⁰ S. Rep. No. 470, 96th Cong., 1st Sess., 3 (1979)

ton-miles per yard hour (Line 6) more than doubled. Heavier trains are traveling faster and moving through the yards more efficiently.

Lines 7 and 8: Rail Prices -- Yield per Ton (1985 \$)¹¹

Line 7: All Commodities

Line 8: Coal

	75	76	77	78	79	80	81	82	83	84	85
(7)	20.7	21.9	22.4	22.5	22.1	22.8	23.6	22.5	21.5	20.5	20.2
(8)	9.9	10.3	10.7	11.2	11.5	12.3	13.6	13.6	13.0	12.6	12.2

The most gratifying part of the revival initiated from Staggers is that improved profitability has not come at the expense of shippers. To the contrary, as a result of new competition under Staggers, shippers are better served today, and prices have generally fallen. Line 7 is an aggregate measure of rail price for all commodities. The numbers there translate into a 14% decline from the peak in 1981. Actually, the decline shown here is understated. The measure of revenue per ton was deliberately used in an effort to be conservative. In recent years the average distance shipped on Class I railroads has increased almost 8%. Rails tons are being shipped more miles for less. Using only the tons measure, as opposed to the ton-mile measure, thus understates the price declines somewhat.

As the graphs appended as Attachment B indicate, this pattern of decline from the peaks following passage of Staggers is quite consistent for most commodities. It is also true for

¹¹ ICC Data: Form R-1 and Form QCS.

both the eastern and western halves of the country.¹² For some commodities, coal amongst them, the benefits took longer to occur. However, the record on coal rates is also quite positive and improving. Nationwide, coal yields peaked in 1981/82, and have declined steadily thereafter. Overall, coal today is moving at lower inflation-adjusted yields than it did in 1980. The picture in the East is brighter, in the West rates did not turn down until 1984. As is discussed in detail in the sections below, the Commission believes that this downturn is directly related to Commission entry and maximum rate policies. We feel confident that prices will continue to decline until fully efficient prices have been settled upon.

The discussion just concluded depicts improved profits, better service, and prices. Naturally, the results vary from firm to firm, from shipper to shipper. But on average, and for the most part, the picture of improved vitality, lower prices, better service, all stemming from less regulation, is accurate. It is, however, correct to ask, what about the exception, what of the captive shipper who is caught in the transition from one set of Federal rules to the next. In the discussion below, we address the active role the Commission has taken to insure that the exception is fairly treated.

¹² In addition to the nationwide picture, revenue per ton in the East and West were examined separately.

ADMINISTRATIVE IMPLEMENTATION
1986-1987

In testimony presented to your predecessor Subcommittee last February, the Commission provided a comprehensive discussion of its Staggers Act implementation policies. The information was formatted section-by-section and contained extensive appendices detailing Commission rulings and appellate litigation.¹³ This year I would like to concentrate on recent developments. These have been numerous, significant, and many are directly related to the concerns of sponsors of new legislation before your Subcommittee. Major actions have been taken regarding rail rates, revenue adequacy, competitive access and other important subjects.

Rate Regulation

The Staggers Act and the 4R Act were intended to reduce the regulation of rail rates. The Commission was charged with regulating only where there was an absence of effective competition. In addition, as an alternative to collective ratemaking, the Staggers Act introduced the concept of index-based rate increases. Thus, the Rail Cost Adjustment Factor was proposed as a method for recovering inflationary increases. Implementation of these various rate provisions of the Staggers Act has been

¹³ See Hearing Before the Subcomm. on Commerce, Transportation, and Tourism of the House Committee on Energy and Commerce, 99th Cong., 2nd Sess. 65-222 (1986).

criticized, for the most part, as having been overly sympathetic to the revenue need of the carriers. In the past eighteen months, the Commission has taken several significant steps that address these criticisms.

Rail Cost Adjustment Factor

Section 203 of the Staggers Act created the Index of Railroad Costs and the Rail Cost Adjustment Factor (RCAF), which are compiled and published quarterly. An increase in a rail rate cannot be found unreasonable if it occurs in concert with a commensurate rise in the Adjustment Factor. Section 203 is silent as to the impact of decreases in the index. It is generally believed that this silence is a result of the prolonged period of rapid inflation preceding enactment; price decreases were not anticipated. However, prices for rail inputs have fallen occasionally, and, in the first quarter of 1986, fuel prices fell substantially, causing a decline in the index. The decline brought a renewed call from shipper groups for rolling RCAF rates, that is, rates that would go up and down with changes in the index.

In Ex Parte 290 (Sub-No. 2), Railroad Cost Recovery Procedures, the Commission proposed (May 1, 1986) to amend its existing rules to require that when the RCAF declines in a given quarter, rail rates established under RCAF procedures should also decline. The Commission also proposed to adopt a mechanism to offset forecasting errors made in earlier periods. Final rules

were adopted (Oct. 17, 1986) that: (1) required a 1.1% roll back in existing RCAF rates;¹⁴ (2) created a "banking" methodology that defers any future increases until such time as past discrepancies are eliminated; (3) provides for "rolling" rates once the "banked" shipper credits are exhausted; and (4) adopts an error-correction methodology. The completion of this rulemaking is a major step introducing balance into the index procedures. For the past two quarters, while the index has crept upward, no rate increases have been allowed under Rail Cost Adjustment procedures because of shipper credits in the "bank."

Maximum Rates

The Commission decided several important maximum rates cases, the most important of which involved the implementation of coal rate policy. In Omaha Public Power District v. Burlington Northern Railroad, (Nov. 20, 1986) the Commission issued its first decision implementing its Coal Rates Guidelines.¹⁵ The

¹⁴ Rate reductions ordered in the Ex Parte 290 (Sub-No. 2) proceeding do not foreclose rail carriers from taking offsetting independent increases. Independent action is encouraged by Staggers, and, on rates below the jurisdictional threshold, carrier flexibility is not subject to regulation. Where rates above that threshold are increased by independent action, normal procedures for protest apply. Our analysis indicates that there have been independent tariffs filed seeking recovery of the 1.1% reduction. These have not been filed by all carriers or for all commodities, and they have contained many exceptions. No shipper protests were filed against any of the increases observed during the study period.

¹⁵ Notice of Final Guidelines, 1 I.C.C.2d 520 (1985).

decision found that a once captive utility¹⁶ had been overcharged during a two and one-half year period. The Commission ordered reparations with interest. In a second application of the Guidelines, Arkansas Power and Light v. Burlington Northern Railroad, (May 13, 1987) the Commission again found that certain, although not all, of the contested coal rates exceeded maximum reasonable levels. Reparations with interest were awarded. In both of these cases, complainants successfully employed the Commission's stand-alone costing methodology in demonstrating the excessive nature of past charges.

In another important coal rate controversy, the Commission awarded reparations to the City of San Antonio, Texas.¹⁷ Section 203(c) of the Staggers Act set a special rate level of 162% of variable cost as a cap for certain coal movements. This cap was found to apply to coal that had been shipped to San Antonio from the Powder River Basin. The Commission considered evidence as to whether the actual rate had exceeded the statutory cap. An excess was found and reparations were ordered. The case set important precedent on variable cost issues, as the Commission accepted shipper innovations to traditional costing, particularly on the estimation of maintenance of way costs.

¹⁶ Commission action in Finance Docket No. 29975 introduced new competition to the Powder River Basin coal mine serving the Omaha power plant. Consequently, the prescription of future rates became unnecessary. A competitively bid contract now covers this service.

¹⁷ San Antonio, Texas v. Burlington Northern Railroad Co., served April 11, 1986.

These newly adopted methodologies were critical to the outcome of the case, and, in important features, were followed in the Omaha Public Power proceeding as well.

The award of reparations under Staggers section 203(c) resolved only a part of the controversy between the City and the two roads serving it, the Burlington Northern and the Southern Pacific. The remainder of the case was to be governed by the Commission's Coal Rate Guidelines. After issuance of the Omaha Public Power decision, the rest of the San Antonio controversy was settled between the parties. In the completed phase of the San Antonio dispute, reparations of \$40,065,267 plus interest were ordered. In the full settlement, the defendant railroads agreed to pay \$111,500,000 to the City. The Commission believes that difference between the reparations figure and the final settlement reflects an awareness by the rail carriers that Coal Rate Guidelines represent an effective cap on excessive coal rates, and that, consequently, they were at risk in continued litigation.¹⁸

Reparations were also ordered in a fourth group of cases, Commonwealth Edison Co. v. Aberdeen & Rockfish Railroad Co.¹⁹ These cases were brought by numerous utility companies and the Departments of Energy and Defense, and the complaints were

¹⁸ In its petition to dismiss the remainder of the suit, San Antonio expressed its "appreciation for the time, effort, patience, and energy which the Commission has dedicated to its case."

¹⁹ Docket No. 37891S, served August 8, 1986.

made against all railroads involved in the transportation of nuclear waste materials. The Commission found that the rail carriers were engaged in an unreasonable practice, in that they sought to avoid their common carrier obligation to carry spent nuclear fuels through the practice of charging "special train rates" at levels far above the actual cost of service. In addition to reparations, a rate level for future movements was prescribed.

Maximum Rate Case Management

During the 1986-87 period, the Commission's maximum rate caseload was reduced by more than half. As of February 21, 1986, the date of the 1986 oversight hearings, the maximum rate docket stood at 50 proceedings, embracing 80 individual complaints. As of May 13, 1987 there are 23 active proceedings, embracing a total of 31 cases. Only three new cases have been filed since the beginning of 1986, and of these, only one remains pending.

Despite this reduction in numbers, the Commission continues to allocate top priority to the movement of these cases. The Commission issued 10 final market dominance determinations in the past 15 months, finding that market dominance existed in nine of the ten proceedings. These cases can now move to a determination of rate reasonableness.

As in the past, the preponderance of cases are not closed by order of the Commission, but by settlement among the

parties. The gratifying record of settlements over the recent period is attributed to a number of factors. The decisions in the San Antonio and Omaha proceedings gave litigants solid information as to how the Commission viewed important issues surrounding variable costs and the application of the final Coal Rates Guidelines. The exact impact of these decisions on the settlement of pending cases is unknown, but the fact of impact is almost certain. In the wake of the San Antonio and Omaha decisions, the Burlington Northern settled with complainants in other long-standing Powder River disputes, in addition to the settlement with the City of San Antonio mentioned above.

A second factor in producing settlements has been the use of docket management conferences. Cases that have been sitting idle "pending negotiations" have been accelerated through conferences before the agency's Chief Administrative Law Judge in which a "fish or cut bait" attitude has been adopted. Parties have been strongly encouraged to either negotiate seriously or begin (resume) the process of "record-building" so that the merits may be presented for decision. This process has worked, if not by provoking settlement, then at minimum by producing movement toward closed records for decision.

Now that standards appear at hand for non-coal and small shipper cases, docket management conferences may produce additional gains. The Commission intends to apply (where circumstances permit) the standards under development in Ex Parte 347 (Sub-No. 2) to non-coal cases now pending. This may permit

decision in several long-standing disputes without further "record-building" expense to the parties.

Revenue Adequacy

In the past year the Commission reconsidered its revenue adequacy standards from the ground up, made substantial revisions to those standards, and used the new standards²⁰ in making the current revenue adequacy determinations. Even with the revised standards, no Class I carrier was found revenue adequate. This fact has led to renewed criticism of the Commission's standards.

In Ex Parte 393 (Sub-No. 1), Standards for Railroad Revenue Adequacy, the Commission announced, in June 1986, a complete review of all revenue adequacy standards. Specifically targeted for reassessment were the issues of: (1) depreciation accounting for track structures; (2) elimination of the impact of deferred taxes; and (3) the use of embedded debt in the cost of capital calculation. This review was completed and a revision of the standards was published in December.²¹ The revised standards reaffirm the reliance on a "return on investment" approach. This is the normal public utility approach to judging a firm's

²⁰ Changes made to effect consolidated reporting for single-system carriers and to adjust the accounting for interest and income taxes were not reflected, because data under the new approach was not yet available. However, these factors are relatively minor in significance compared to the deferred tax and depreciation changes which were implemented, and would not have changed the outcome of the 1985 determinations for any carrier.

²¹ Ex Parte No. 393 (Sub-No. 1), Standards for Railroad Revenue Adequacy, served December 31, 1986.

earnings by comparison of its rate of return to the cost of buying capital in the marketplace. This methodology has two distinct undertakings: (1) the estimation of the firm's present earnings, and (2) the estimation of the true cost of capital for the industry.

As to the first half of the process, the Commission's revised standards are fully in line with traditional public utility accounting. The removal of deferred taxes from the investment base, a consistent point of criticism regarding the earlier standard, affects significantly the estimated returns of the Class I rail carriers. Likewise, the change to standard depreciation accounting also had a significant impact on return on investment. The table appended as Attachment C shows the impact of these adjustments on the rates of return of the Class I carriers. Recent analyses done by the General Accounting Office²² and the Railroad Accounting Principles Board²³ support the Commission's revised standards.

There remains dispute over estimation of a target rate of return. The issue centers on the calculation of the cost of

²² United States General Accounting Office, Railroad Revenues: Analysis of Alternative Methods to Measure Revenue Adequacy, October 1986.

²³ The Railroad Accounting Principles Board was created by Section 302 of the Staggers Rail Act. Its membership is appointed by the Comptroller General, and it is assigned the task of establishing principles for governing the determination of economically accurate railroad costs for use in regulatory proceedings by the ICC. The Board's Exposure Draft, published February 20, 1987, fully affirms the use of a return on investment standard as calculated under the revised Ex Parte No. 393 (Sub-No. 1) standards.

debt. In its June 1986 notice, the Commission indicated that it was considering the use of embedded debt -- that is, the cost of debt already on the books of the rail carriers -- in calculating the cost of capital. (The remaining component in this calculation is the cost of equity capital, which is done consistent with public utility practice.) The alternative to embedded debt is the cost of current debt, an alternative which the Commission has used since shortly after Staggers enactment. After reconsidering the matter, a majority of the Commission decided that the standard should continue to employ the current cost of debt for the estimation of the target rate of return.

There are credible arguments on both sides of the cost of debt controversy. On the one hand, it can be said that a return to a regulated firm in excess of its actual cost of debt is, almost by definition, above the known expenses of the firm. Under this view, allowing current costs, if they are higher than embedded costs, is much like allowing a markup on real wage expense, or fuel. Consequently, state utility regulators use embedded debt costs. On the other hand, the rail market is primarily competitive. Unlike state electric utility commissions, the ICC cannot, and does not attempt, to insure that each of the regulated firms is fully profitable. By statute, our rules must permit the opportunity for carriers to attract the capital necessary for reinvestment in an efficient system. The use of current debt costs helps to provide this opportunity. Moreover, the railroads receive no guarantee that the cost of

embedded debt will always exceed the cost of current debt. The differential has dropped in recent years with the decline in interest rates.

Since the Commission's maximum rate standards do not permit the fact of revenue inadequacy to justify an excessive rate,²⁴ captive shippers are not put at risk by use of current debt costs. The Rail Accounting Principles Board agrees with the Commission's reliance on current cost, and the General Accounting Office found the arguments on both sides respectable and offered no preference.

Whatever one thinks about the theoretical aspects of this controversy, it is important to keep in mind that it has little practical consequence. Because debt is only 28% of the investment base, no defensible cost of debt would have made even one railroad revenue adequate. The Commission's cost of equity, a far more important number, is in the middle of the range used by other commissions. Consequently, we believe the practical consequences of any change in methodology would be quite narrow.

The Commission has also given extended consideration to the proper calculation of equity capital. In Ex Parte No. 464, Railroad Cost of Capital - 1985, public participants were asked to provide comment on alternatives to the "Discounted Cash Flow"

²⁴ In each of the reparations cases cited in the "Rate Regulation" section above, the rail carriers against which reparations were awarded were revenue inadequate. In the Omaha Public Power case, the Burlington Northern argued explicitly that its status as a revenue inadequate carrier should be regarded as a shield against damage awards. The Commission rejected the argument without hesitation.

(DCF) methodology presently employed. While DCF is the most widely used methodology among state regulatory commissions, the Commission was concerned that aspects of the methodology were not performing accurately for the rail sector. Comments indicated that other widely used approaches produced higher equity costs, with less apparent justification than the existing methodology. Since the Commission's current standard was not shown unreasonable, Commission staff undertook to compare the target return on equity generated for rail carriers by the current methodology against the targets set by state utility commissions. The results showed the ICC figure (14.7%) to be almost precisely identical to the average for the state commissions, which, given the additional risk factor generally ascribed to rail transportation, indicates that the ICC approach is well supported.²⁵ While we continue to employ the existing standard, we have again asked for comment on improving the methodology in Ex Parte No. 466, Railroad Cost of Capital - 1986.

Finally, in order to speed the cost of capital determination, we have proposed accelerated time tables for the submission of data and comment in future proceedings. Ex Parte No. 466 (Sub-No. 1), Railroad Cost of Capital - Proposed Expedited Procedures.²⁶

²⁵ See Attachment D.

²⁶ Served April 27, 1987.

Competitive Access

The Staggers Rail Act encourages reliance on competitive entry. Competition among railroads, or at least the realistic threat of competition, was seen as an important safeguard against inadequate service or unreasonable price.²⁷ To foster new competition, Congress enacted changes to the provision governing the construction of new lines, and provided, for the first time, explicit power to require mandatory switching.²⁸ Intra-rail competition is also substantially affected by the use of through routes and joint rates. The Commission has been active in all these areas in the 1986-87 period.

New Construction

The Staggers Act amended the new construction provision of the Interstate Commerce Act to reduce the burden that a willing entrant had to meet before an application for new construction could be granted.²⁹ In Finance Docket No. 30700,

²⁷ H. Rep. No. 1035, 96th Cong., 2d Sess., 66 (1980).

²⁸ Mandatory switching refers to the movement of cars within a terminal area by one carrier for the benefit of a second carrier. Switching differs from joint line service in that the switch is typically performed for a flat fee, and is not directly related to rates charged, or the origins or destinations of the switched cars. The Staggers Act (Section 223) uses the term "reciprocal switching," suggesting that any obligations imposed by the Commission would run to both (or all) carriers involved in a particular controversy. In practice, the requests received by the Commission have not involved reciprocal obligations.

²⁹ The old standard stated that authority had to be required or shown to enhance the public convenience and necessity. Staggers softened this standard, and additionally gave new entrants eased entry over the lines of other rail carriers. Pub.

Chicago and North Western -- Construction and Operation -- In Campbell County, WY,³⁰ the Commission addressed the application of the new Staggers Act standard for the second time in the context of Powder River Basin coal transportation. New construction was approved again, resulting in additional competition for substantial coal reserves held by Mobil, Exxon and AMAX.

The maturing of a second system in the Powder River Basin has born out the expectation of Staggers regarding the benefits to be derived from new competition. Press accounts of competitively bid contracts for Powder River coal transportation indicate savings to consumers between \$1 and \$7 per ton. (Present annual production from the region is approximately 250 million tons.) From the ICC's perspective, we have also seen a rapid evaporation of Powder River caseload, as the impact of the Commission's Omaha Public Power decision, coupled with the need for competitive bidding, has produced a number of settlements, including the settlement with the City of San Antonio mentioned above.

The Commission approved new construction applications in other proceedings during 1986-87.³¹ Experience with these and

L. No. 96-448, sec. 221, 94 Stat. 1928.

³⁰ Served January 15, 1986.

³¹ See Finance Docket No. 28272, Star Lake Railroad Co.-- Rail Construction and Operation in McKinley County, New Mexico, (access to coal reserves in San Juan Basin); Finance Docket 30186, Tongue River Railroad Company - Rail Construction and Operation in Custer, Powder River and Rosebud Counties, Montana, served May 9, 1986, (access to coal in Tongue River Valley).

similar applications in the past several years indicates that a less costly, less uncertain administrative processing ought to be made available. While the benefits of competition through new construction are readily apparent, applicants have been put in a defensive posture by the existing rules governing filing. They are often forced to respond to extensive and repetitive opposition. The Commission now has before it consideration of whether new construction applications can be handled under efficient procedures which will distribute more properly the burden in these proceedings, and insure that they are completed quickly.

Switching and Trackage Rights

Apart from new construction, competitive entry can be achieved through mandatory switching and trackage rights. Section 223 of the Staggers Act enacted a new provisions that permits the Commission to order one carrier to pick up or deliver within terminal areas the cars of a second carrier for a fee, where the switching is practicable and in the public interest, or where the switching is necessary to provide competitive rail service.³² The proper interpretation of this section has been the subject of much debate. Legislative history gives only scant guidance, speaking to the need to encourage switching to promote competition,³³ but suggesting that its application is most clear where

³² Pub. L. No. 96-448, sec. 223, 94 Stat 1929.

³³ H. Rep. No. 1035, 96th Cong., 2d Sess., 67 (1980).

existing service is inadequate.³⁴ The Administration bill introduced in 1979 would have made switching mandatory in all standard metropolitan areas. This was rejected by both Chambers in favor of a discretionary approach. While a few critics press for an aggressive program that would use switching to introduce widespread changes in the rail service, the Commission has chosen to interpret the section along the lines presented to it by shipper and rail groups in Ex Parte No. 445 (Sub-No 1), Intra-modal Rail Competition. These rules, adopted in 1985, provide that switching will be ordered where needed to remedy competitive abuse or its threat.³⁵

Economically speaking, the preference for a discretionary approach based on a showing of competitive need arises from the uncertain maintenance and investment consequences of forced access into one firm's plant to the benefit of its competitors, an issue which raises knotty problems regarding compensation. Legally speaking, the Commission's rules are more consistent with the approach taken in Staggers, that is, entry keyed to competitive need, whereas, our critics appear to seek the type of broad and automatic application offered by the Administration in 1979, but rejected by Congress in 1980. In a decision upholding the Commission's Intramodal Rail Competition rules, the court,

³⁴ S. Rep. No. 470, 96th Cong., 1st Sess., 42 (1979).

³⁵ While strictly speaking the Intramodal Rail Competition rules do not govern trackage rights applications, many of the same considerations can apply. See No. 39021, Midtec Paper Corporation v. Chicago and North Western Transportation Co., at 6, served December 15, 1986.

reviewing pertinent legislative history, indicated that it saw "not the slightest indication to mandate a radical restructuring of the railroad regulatory scheme."³⁶

Requests for use of the new switching provision have been infrequent. In the six years since passage, we have received fourteen petitions or applications directly requesting relief under the section. Three of these are pending, and four were dismissed at the complainant's request after settlement. Of the remaining seven, the Commission denied switching in four cases,³⁷ granted it in two, and, in the last, the Commission suspended a tariff restricting the use of switching, which was then withdrawn.

In the first switching case given explicit consideration under the new Intramodal Rail Competition rules, the Commission found no basis in the record on which to grant relief. In this case a paper company and the Soo Line Railroad sought forced switching and trackage rights on the Chicago and North Western system. The Commission's decision, entitled Midtec Paper

³⁶ Baltimore Gas and Electric Company v. United States and Interstate Commerce Commission, Nos. 85-1761 and 85-1845, slip op. at 15, (D.C. Cir. Apr. 21, 1987).

³⁷ Two denials have been appealed. In Central States Enterprises v. Seaboard Coast Line Railroad, No 38891, served May 15, 1984, the Commission's finding that the request was not related to competition was affirmed. Central States Enterprises, Inc. v. I.C.C., 780 F.2d 664 (7th Cir. 1985). The second case, Midtec, remains pending. See note next following and accompanying text.

Corporation v. Chicago and North Western,³⁸ has been frequently mischaracterized.

Under the Intramodal rules, the focus of concern is on competitive problems. When Midtec was first considered, which was prior to adoption of Intramodal,³⁹ the Commission concluded that reciprocal switching could not be ordered in the absence of a showing of market dominance. This aspect of the decision was criticized sharply. Upon reconsideration in the context of the Intramodal rulemaking, the Commission abandoned this position, and the earlier holding was explicitly overruled in the second Midtec decision. The Commission indicated it would look directly at the issue of competitive misbehavior. Further, it made clear that the Commission's review was not limited to pure antitrust claims, but that we would also consider evidence of unreasonable rates or poor service -- matters which would not themselves be considered as sufficient to support an antitrust claim. Despite the availability of this flexible format for the demonstration of competitive harm, the record in Midtec did not disclose abuse. Consequently, relief was denied. Had it been granted here, the precedent established would logically have provided forced switching almost automatically in one-carrier markets. The Commission declined to do, in the context of an isolated-adjudication, what Congress had declined in 1980, and what had

³⁸ No. 39021, served December 15, 1986.

³⁹ Midtec Paper Corporation v. CNW, 1 I.C.C. 2d 362 (1985).

been rejected by a majority of the shippers in the negotiations surrounding the Intramodal agreement.

In the 1986-87 period, there have been significant actions regarding trackage rights outside of the context of the Intramodal rules. In one instance, over the opposition of the Chicago North Western and the Grand Trunk, the Soo Line was given important new access to the Detroit-Chicago and Chicago-Eastern Canada markets.⁴⁰ In another, the Commission granted trackage rights to the Denver and Rio Grande and the MKT, in order to insure that competitive access conditions prescribed in an earlier merger would become effective.⁴¹

Joint Rates

In enacting the Staggers Act, Congress recognized that the existing joint rate system was a serious problem for the rail system.⁴² While the new law provided for some limited relief, the Conferees believed that the Commission already had authority

⁴⁰ Finance Docket No. 30703, Soo Line Railroad Company--Joint Use of Lines--Chesapeake and Ohio Railway Company, served September 10, 1986.

⁴¹ Finance Docket No. 30759, Denver and Rio Grande Western Railroad Company and Missouri-Kansas-Texas Railroad Company v. St. Louis Southwestern Railway Co., served January 9, 1987.

⁴² The Conference Report states:

Two of the major problems caused by the existing joint rate system are too low-divisions and a proliferation of uneconomic routes protected by the archaic "commercial closing" doctrine.

H. Rep. 1430, supra, at 111.

to address the roots of the problem.⁴³ As it has turned out, much of the controversy surrounding joint rates has arisen under the pre-existing provisions of the Interstate Commerce Act. Several carriers moved aggressively to eliminate the unprofitable divisions and uneconomic routings that Congress had recognized as problems. (See note 42 above.) The Commission permitted many of these actions to go forward. Thus, joint rate cancellations in the years immediately following Staggers created substantial controversy.

This controversy was largely responsible for the adoption in 1985 of the Ex Parte No. 445 (Sub-No. 1) Intramodal Rail Competition rules noted above. These rules provide greater notice to shippers than had been the case earlier, and they provide an opportunity for a negotiated agreement before litigation is commenced. The rules also provide that the Commission will prevent the cancellation of a joint rate, or prescribe a new one, where necessary to remedy or prevent an act that is contrary to the competition policies of the National Transportation Policy

⁴³ In referring to the new surcharge provisions for joint rates, the Conference Report states:

These provisions ... in no way imply an intent on the part of Congress that a carrier's existing rights under the Act to secure improved earnings over specific routes should be limited. The Conferees recognize that a carrier cannot remain healthy only earning revenues at (the surcharge) levels, but believe ...existing remedies, assuming the Commission chooses to administer them in order to realize the revenue adequacy goals of the Act, should be adequate to remedy other joint route and division problems.

H. Rep. 1430, supra, at 112.

or is otherwise anticompetitive. Ex Parte No. 445 (Sub-No 1) was recently affirmed in the courts.⁴⁴

To date, the joint rate experience with the new rules has been limited, which may in itself be a good sign.⁴⁵ The cancellation of joint rates has been protested only on three occasions under the new rules. The liberal suspension standards incorporated in the new rules have led to suspensions in each of the protested cancellations. In one case, the Commission permitted the cancellation to take place, finding that a major carrier sought to use the rules to the detriment of a new regional carrier, without any relation to competitive need.⁴⁶ In the other two instances, the cancellation tariffs were withdrawn after the suspensions were affirmed by the Commission.⁴⁷

In addition to the Ex Parte No. 445 (Sub-No. 1) proceedings, the Commission also decided a very significant case involving broad joint rate cancellations effected by Conrail in 1981. These cancellations were permitted by the Commission in

⁴⁴ See note 36, above.

⁴⁵ Since the rules provide for 45 days advance notice of joint rate cancellations, and also provide that a carrier must offer a justification and negotiate with aggrieved parties, there may well be occasions in which the rules will have their desired effect -- the resolution of disputes -- but the Commission will not be a party to the resolution.

⁴⁶ I & S No. 9266, Cancellation of Joint Rates at Bureau, IL, IIRR, served December 2, 1986.

⁴⁷ I & S No. 9267, Cancellation of Single-Factor Through Joint Rates on Coal, CNW; I & S No. 9268, Cancellation of Joint Rate on Transit at Gonzales, TX, SP.

1982,⁴⁸ in a case which gave rise to much of the controversy noted above. The Commission's original decision was overturned on appeal, the court finding insufficient evidentiary justification of the cancellations.⁴⁹ On remand, the Commission reopened the case for new evidence, and, after considering the updated record, reversed its prior holding and found the cancellations unsupported by the evidence. Conrail was ordered to renegotiate the cancelled rates, with the burden placed on Conrail in any subsequent disputes that cannot be negotiated.⁵⁰

Contract Rates

Section 208 of the Staggers Act⁵¹ provides the freedom to price rail services through individual contracts. This significant break with traditional practice was intended to produce efficiency by permitting carriers to tailor rates and services to distinct needs and differing competitive circumstances. The Commission is provided just sixty days for the review of contract filings, and challenges to contracts are permitted on limited

⁴⁸ Changes in Routing Provisions - Conrail - July, 1981, 365 I.C.C. 753 (1982).

⁴⁹ Chesapeake and Ohio Ry. Co. v. United States, 704 F.2d 373 (7th Cir. 1983). In a separate case involving Conrail cancellations of the same period, the Commission has just been upheld in its determination not to require the reinstatement of cancelled routes absent a showing that prescription would produce more efficient routings. Pittsburgh and Lake Erie Railroad Co. v. I.C.C., 796 F.2d 1534 (D.C. Cir. 1986).

⁵⁰ Changes in Routing Provisions - Conrail - July, 1981, served September 5, 1986.

⁵¹ Pub. L. No. 96-448, sec. 208, 94 Stat 1908.

grounds. Congress amended the contract rate provisions in 1986 as part of the enactment of the Conrail Privatization Act.⁵² The amendments provided for additional disclosure of the terms of agricultural contracts (other than forest products and paper),⁵³ more liberal discovery for shippers challenging contracts, and a study, to be conducted by the Commission's Contract Rate Advisory Service, of the impact on competition among agricultural shippers of the contract rate provisions.

Rail contracting is one of the most significant developments effected by Staggers enactment. Increasingly high percentages of traffic are carried under contract rates. Estimates for coal and grain indicate that contract carriage covers more than sixty percent of the rail traffic for each. As the following table indicates, contracting has grown at a rapid rate since its inception.

⁵² Pub. L. No. 99-509, sec. 4051; full act entitled, Omnibus Budget Reconciliation Act of 1986.

⁵³ Hereafter, the contracts affected by the Conrail Privatization Act amendments covering limited agricultural contracting will be referred to as "grain" or "grain contracts."

Summary of Contract Rate Activity
October 1980 to December 1986

Period Ending ⁵⁴	Contracts Filed	Monthly Average
Dec 1981	768	51
Dec 1982	3,248	271
Dec 1983	8,285	690
Dec 1984	7,751	646
Dec 1985	12,448	1,037
Dec 1986	15,229	1,269

Contract terms and conditions are varied and include individualized rates, service options, investment apportioning, and numerous other features designed to meet particular needs. While the majority of contracts are drawn for periods of one year or less, multi-year contracts, some covering periods of twenty years or more, are not uncommon. A breakdown of all contracts by major commodity groups follows. The number of contracts for coal is understated due to the effect of an export coal exemption from filing between September 1983, and May 1985. Similarly, the number of contracts for forest products, lumber, and paper is below the actual number, due to the exemption from regulation (including contract filing) of boxcar traffic.

⁵⁴ The period ending December 31 is for the 15 months commencing with Staggers enactment in October 1980.

Contract Rate Activity
By Major Commodity Group
1980-1986

Commodity	Number	Percent
Bulk Products, Chemicals, Minerals.....	16,186	34
Forest Products, Lumber Paper.....	4,851	10
Grain.....	11,073	23
Foodstuffs.....	3,599	7
Iron and Steel, Metals, Scrap.....	5,766	12
Coal.....	2,634	6
Auto, Parts, Machinery, Implements.....	1,201	3
Misc. Commodities, Services.....	2,419	5

What concerns have been expressed about contracting have largely centered around the possibility of discrimination favoring large grain shippers. Contracts filed with the ICC are confidential, except to the extent disclosed by summaries published by the ICC, or to the extent "discovered" by a complainant in the course of litigation. Dissatisfaction with the degree of disclosure and the availability of discovery⁵⁵ led to the passage of the grain contract provisions in the last session.

⁵⁵ The Commission's original rules for disclosure and discovery were affirmed on the disclosure issues, and remanded on the issue of discovery. Water Transport Association v. I.C.C., 722 F.2d 1025 (2d Cir. 1983). The Commission issued interim rules governing discovery in July 1984, but held further action in abeyance, pending negotiations between shipper and rail groups.

Interim rules implementing the Congressional amendments were made effective in January 1987.⁵⁶

To comply with the new law, the Commission made changes to its contract rate summary and discovery rules for grain commodities. As to summaries, we required additional disclosure including the shipper's identity, specific origins and destinations, shipper facilities, duration, actual volume, effective date of contract (whether before or after filing), and the tariff provision that would apply in the absence of the contract. To liberalize discovery, the Commission initiated a new informal discovery process, liberalized the tests governing who might discover a grain contract, and eliminated filing requirements that had made discovery burdensome to potential protestants.⁵⁷

The Commission also took steps to liberalize its rules for non-grain shippers not covered by the 1986 amendments. More disclosure in the contract summaries was ordered, including origin and destination information, and data regarding effective dates. Non-grain discovery rules were also revised, although a pre-discovery showing of need for information was retained for these commodities.

⁵⁶ Ex Parte No. 387, Rail Transportation Contracts, served December 19, 1986; as modified by order of Chairman Gradison, served January 22, 1987.

⁵⁷ Parties seeking discovery of grain contracts no longer have to show likely injury, need for specific information, or the fact of a prior attempt to negotiate a similar contract. (Railroads are immune from most agricultural protest if they have offered a similar contract to the protestant.)

It is too soon to make any hard determinations on the impact of the new disclosure and discovery rules. Protest against contracts and requests for discovery have been quite rare in the past. There have been fewer than twenty such instances, compared to contract filings that now exceed 50,000. Whether the liberalization of the disclosure/discovery rules results in a change in the number of protests, or whether it will have a more direct impact on contracting per se, will be monitored closely by the Commission's Contract Rate Advisory Service.⁵⁸ As of May 1, there were no requests for discovery under the liberalized rules.

Section 4051 of the Conrail Privatization Act also required that the Commission undertake a study of the competitive effects of grain contracting. A notice requesting public comment was issued on November 17, 1986. Additionally, recognizing the difficulty in obtaining responses from small shippers, we retained the services of consultants to survey shippers in the major grain producing states of Illinois, Indiana, Iowa, Kansas, Minnesota, Nebraska, North Dakota, Oregon, South Dakota, Texas and Washington. Based on the analyses of the comments and the

⁵⁸ One potentially troubling statistic has already been noted. Prior to the implementation of the January 1987 rules, contracts for grain -- grain is the commodity most fully affected by the new law and the agency's new rules -- had typically accounted for 23 percent of all contract activity. For the period between the end of January and the end of March, grain contracts fell to below 9% of all filings. Whether the decline reflects a bunching of contracts in the period just before the imposition of new disclosure requirements, or whether there is some long-term significance is not yet apparent.

state surveys, the Commission's Contract Rate Advisory Service overall assessment was that:

Many small country elevators are disadvantaged by the high volume contracts of larger elevators. However, these disadvantages would still be encountered under a tariff system where reduced rates for multiple car and unit train shipments are permitted.

Most large shippers and receivers of grain use contracts extensively and the impact of contracts on their position in both domestic and foreign markets has been favorable.

Overall, farmers have benefitted from contracts because contracts have resulted in higher prices being paid for grain.

Abandonments

Abandonment of rail lines slackened again in the past year, and the total mileage abandoned in Fiscal 1986 is the lowest since shortly after the 4R Act enactment in 1976.⁵⁹ It is impossible to predict whether further declines are probable, but two factors point in that direction. Carriers have used the freedoms provided by Staggers, the 4R Act, and the Northeast Rail Services Act to cull out the most obvious candidates for abandonment. There obviously were incentives to eliminate the most unprofitable lines first. Increasingly, carriers are faced with more problematical choices.⁶⁰ Given a flexible regulatory

⁵⁹ Total track abandoned in FY 1978 was 2416 miles. Abandonments apparently peaked in FY 1982 at 5151 miles. For FY 1986, the comparable figure is 2087.

⁶⁰ In FY 1986, the Commission denied 4 abandonment applications involving 147 miles of line. Both these figures represent the second highest yearly totals since Staggers enactment, in part due to the fact that the many of the more obvious cases have

climate that permits a carrier to make the most of its marginal lines, abandonment may not be the preferred choice. Somewhat related to this first point is the fact that Class I carriers are also selling lines to new operators as an alternative to abandonment. This development, discussed below in more detail, is of great potential consequence for the maintenance of rail service.

The Commission took two important actions in the 1986-87 period that should be of interest. In Ex Parte No. 274 (Sub-No. 11), Abandonment Regulations -- Costing,⁶¹ the Commission adopted changes in its abandonment and subsidy regulations that should be of benefit to shippers. The new rules no longer recognize a carrier's return on investment in locomotive and freight cars as an avoidable cost. The costs are recognized as opportunity costs, but are not considered in estimating the line's direct profitability. In Ex Parte No. 274 (Sub-No. 16), Exemption of Rail Line Abandonments or Discontinuances - Offers of Financial Assistance, the Commission tentatively concluded that financial assistance procedures should be made available even in instances where full exemption from the abandonment provisions is otherwise available. These proposed rules which are being applied pending final decision, broaden the application of the financial assistance already been heard.

⁶¹ Served January 23, 1987.

tance provisions contained in section 402 of the Staggers Rail Act.⁶²

Short Line and Regional Railroads

The 1986-87 period continued to be one of rapid growth for short line and regional railroads. The Commission's Office of Transportation Analysis (OTA) has been actively studying these developments, and has to date surveyed 162 of the new operators, and has recently met on site with labor representatives and employees of most of the larger, regional railroads. As the growth of the short line industry is still fluid, no categorical conclusions from this study will be offered. Some important observations can be made.

Since passage of the Staggers Rail Act, there has been an unanticipated growth in short line and regional carriers. The carriers surveyed by OTA operate 10,955 miles of line, equal to approximately 7.5 percent of the total railroad mileage operated in 1985. The total work force on these carriers is above 3,000 employees, about 1 percent of the size of the work force on Class I railroads. Short lines were contacted in 34 states, but the heaviest concentration is found in the Northeast and the South. Regional railroads are more likely to be found in

⁶² The Commission also reissued its Ex Parte No. 274 (Sub-No. 8) rules governing the exemption of out of service rail lines from the abandonment application process. Reconsideration of these rules was required by judicial remand in Illinois Commerce Commission v. ICC. (787 F.2d 616 (D.C. Cir. 1986)) These rules provide for efficient processing of lines that have been out of service for two or more years.

the South and Midwest. Much of the track of the smaller lines would have been abandoned but for the short line operator. While part of the trackage of regional carriers would have been targeted for abandonment, these lines also include some medium density markets.

Distribution of Surveyed Carriers by Mileage

Length (miles)	Number of Railroads	Total Miles	Percentage of Total Miles
0-5	27	74	.7
6-10	15	128	1.2
11-25	30	479	4.4
26-50	38	1,309	11.9
51-75	12	729	6.7
76-100	13	1,122	10.2
Over 100	27	7,114	64.9

In Ex Parte No. 392 (Sub-No. 1), Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C.10901,⁶³ the Commission created a mechanism which facilitates the formation of new lines and reduces regulatory burdens, in keeping with the Staggers Act goal of encouraging new entry, preserving service, and minimizing regulations not necessary to prevent the abuse of market power. The class exemption provides that an acquisition may go forward seven days after notification to the Commission. Where there is opposition, petitions to revoke or to

⁶³ Served, January 15, 1986.

stay will be heard by the Commission.⁶⁴ The decision to promulgate a class exemption was taken after extensive experience with the formation of new carriers, involving more than one hundred proceedings between 1981 and 1986. This experience demonstrated uniformly that the public convenience would be enhanced by the preservation of service and jobs, and that little shipper or community opposition was likely.

Labor protection, committed to Commission discretion in new acquisitions by non-carriers, is not automatically granted under the class exemption, following the practice developed with individual applications. The Commission determined that the costs of labor protection were generally not warranted, given the absence of any record of significant labor harm in the more than one hundred cases that had been processed individually. The probability that such costs would forestall the development of these lines, thereby risking loss of rail service and continued decline in rail employment, was considered controlling. The agency did, however, provide that it would impose protection if shown to be necessary in a particular case. This has been a contentious issue. The class exemption was recently affirmed by

⁶⁴ Petitions to revoke have been filed in seven acquisitions processed under the class exemption.

the circuit court for the District of Columbia⁶⁵ and individual transactions have been appealed on labor protection issues.⁶⁶

Mergers and Intermodal Acquisitions

The Commission approved a joint application of the CSX Corporation (CSX) and Sea-Land Corporation for the acquisition of control of Sea-Land by CSX.⁶⁷ CSX controls the Chessie system railroads and American Commercial Barge Lines. Sea-Land is a holding company providing containerized traffic between the contiguous 48 States and foreign markets. The Commission found that the application did not contravene Federal law, and that the relationship between rail carriage and ocean movement of containerized freight may be developed advantageously to the firm's and the public's interest.

In Finance Docket No. 30400, involving the proposed merger of the Sante Fe and Southern Pacific Railroads, the Commission currently has before it the question of whether it should reopen the proceeding. On October 10, 1986, the Commis-

⁶⁵ Illinois Commerce Commission v. I.C.C., D.C. Cir. No 86-1107, argued May 7, 1987, Commission aff'd. without opinion May 12, 1987.

⁶⁶ See, e.g., Railway Labor Executives' Ass'n v. United States, 811 F.2d 1327 (9th Cir. 1987) (affirmed in part, remanded in part); Pennsylvania State Legislative Board v. I.C.C., No 86-3231 (3rd Cir. Dec. 2, 1986) (individual exemption affirmed without opinion).

⁶⁷ Finance Docket No. 30900, Joint Application of CSX Corporation and Sea-Land Corporation Under 49 U.S.C. 11321, served February 24, 1987. A related exemption application involving motor carrier subsidiaries of Sea-Land was held in abeyance.

sion served a decision denying the proposed merger. The applicants have sought reopening of the proceeding and presented evidence in support of their request, including agreements that have been concluded with rail carriers that were formerly opposed to the merger. Other carriers and the Department of Justice are, or remain, opposed to the merger. The Commission heard oral argument on the question of reopening on May 14, 1987.

In a second rail merger proceeding, the Commission is considering the application of the Union Pacific Corporation for control of the Missouri-Kansas-Texas Railroad.⁶⁸ A procedural schedule has been established and the case is before an agency administrative law judge.

Rail carriers continued to show interest in the acquisition of motor carriers. Union Pacific Corporation (parent of the Union Pacific Railroad Corporation) filed an application for control of Overnite Transportation Company.⁶⁹ The application was accepted by the Commission on January 20. July 17 is set for the close of the record. Opposition appears limited. Overnite is a large less-than-truckload carrier operating primarily in the eastern two-thirds of the nation.

The Burlington Northern also sought, through exemption, the

⁶⁸ Finance Docket No. 30800. Application filed November 11, 1986. Procedural schedule served March 3, 1987.

⁶⁹ Finance Docket No. 31000, Union Pacific Corporation-Control - Overnite Transportation.

control of six motor carriers.⁷⁰ These exemptions were granted by the Commission after it was determined that they were limited in scope and would not result in the abuse of market power.

The status of rail/motor acquisitions was clouded somewhat by a court reversal of the 1985 Norfolk Southern Corporation acquisition of North American Van Lines.⁷¹ The court reversal was in turn reversed by action of the Congress in the Omnibus Drug Enforcement, Education and Control Act of 1986.⁷² The Omnibus Drug Act approved the Commission's guidelines for analysis of the Norfolk Southern application (in essence guaranteeing its legality),⁷³ and also provided that the same standard of review may be applied in the Union Pacific/Overnite transaction. Its impact on the Burlington Northern cases, if any, is not clear.

⁷⁰ No. MC-F-16248, Burlington Northern, Inc. - Control Exemption - Victory Freightway Systems, Inc., served February 13, 1986; No. MC-F-17301, Burlington Northern Inc. and Burlington Northern Motor Carriers, Inc. - Control Exemption - Stoops Express, Inc., Wingate Trucking Company, Inc., and Taylor-Maid Transportation, Inc., July 28, 1986.

⁷¹ International Brotherhood of Teamsters, Chauffeurs and Warehousemen and Helpers v. I.C.C., 801 F.2d 1423 (D.C. Cir. 1986); petition for rehearing filed November 14, 1986.

⁷² Pub. L. 99-570, sec. 3403 (1986).

⁷³ The acquisition was sustained on petition for rehearing. International Brotherhood of Teamsters v. I.C.C., *supra*, May 8, 1987.

Car Service Compensation

Car service compensation is a catch-all term used to cover the compensation that railroads pay to one another for the use of freight cars (per diem car hire payments) and to shippers for the use of shipper-owned cars (mileage allowances). Freight car shortages had been a serious problem in the decade preceding the 4R Act and the Staggers Act. Section 224 of the Staggers Act was directed to car compensation. It repealed the "incentive element" provision that had explicitly given the Commission authority to impose incentive payments when car types were in short supply. It also provided explicit antitrust immunity for collective negotiations among shippers seeking agreement on car service compensation levels. The Conferees stated that the incentive element was not the best means of attracting capital, that the basic rates should be adequate, and that the Commission should continue to examine means (the Conferees specifically mentioned flexible car hire) for making car compensation more responsive to market forces.⁷⁴ The Commission has had several occasions to address car compensation issues in the past 18 months.

In Ex Parte No. 346 (19), Boxcar Car Hire and Car Service,⁷⁵ the Commission adopted changes to the rules under which rail carriers compensate one another for the use and handling of each others boxcars. The new rules are designed to produce

⁷⁴ H. Rep. No. 1430, 96th Cong., 2d Sess., 117 (1980).

⁷⁵ Served September 12, 1986.

greater efficiency in the boxcar fleet by creating incentives for the negotiation of bilateral agreements. Explicit protection is included for the boxcar fleets of smaller carriers that had protested earlier attempts at modernizing the per diem formula.⁷⁶

In Ex Parte No. 328, Investigation of Tank Car Allowance System,⁷⁷ the Commission adopted a negotiated agreement between the railroad industry and the major suppliers of tank cars. The agreement is designed to improve the responsiveness of tank car allowances to supply and demand considerations, and it provides that carriers bear the burden of proof in any contested instances of deviation from the national formula. In a related complaint proceeding, the Commission found deviations from the pre-existing formula were not authorized and ordered the filing of evidence and argument on whether reparations were warranted to shippers that had received reduced mileage payments.⁷⁸

Finally, the Commission voted in open conference in February 1987 to decline a request to impose a mandatory uniform mileage allowance for the use of shipper-owned hopper cars.⁷⁹ A decision in this case is under preparation. In a related

⁷⁶ Section 4052 of the Omnibus Budget Reconciliation Act of 1986, *supra*, provides that the the "portion of the rule adopted...in Ex Parte 346 (Sub-No. 19)...consisting of small railroad protections, is hereby affirmed.

⁷⁷ Served September 26, 1986.

⁷⁸ No. 39909, Cap on Mileage Allowance for Use of Privately Owned Tank Cars, SP February 4, 1987.

⁷⁹ No. 39117, Lo Shippers Action Committee v. Aberdeen and Rockfish Railroad Company, Conference of February 24, 1987.

proceeding, the Commission's award of reparations to shippers that had received reduced mileage payments under an unlawful mileage cap was affirmed after judicial review. 80 While reparations had been awarded, it was the shippers who took the Commission to court, claiming that the Commission had not gone far enough towards mandating compensation based solely on the cost of car ownership.

Conclusion

This concludes the Commission's written statement. The principal points that we hope to have made are that, first, the Staggers Act is working well for nearly all concerned, and second, the Commission is actively working to maintain a balanced set of regulatory policies that will provide carrier flexibility, but protect shippers that are presently without alternatives. The number of problems appears to be receding, as one would expect, with the accumulation of experience with new marketplace opportunities, and with a better understanding of the Commission's standards for remedial regulation.

⁸⁰ Lo Shippers Action Group v. I.C.C., No. 86-1037 (D.C. Cir., Nov. 7, 1986) dismissing petitions appealing No. 39908, Mileage Allowances for Covered Hoppers, Grain and Grain Products, BN, served December 5, 1985.

Separate Expression

Commissioner J. J. Simmons III, commenting:

In my view, today's testimony presents an overly favorable interpretation of the Commission's implementation of the Staggers Act. Despite some progress in recent months, much work remains before the Commission can claim to have successfully met its responsibilities under the Act. In the competitive access area, this Commission has erected new barriers to such access as often as it has promoted additional competition. Many abandonment proposals, especially requests for exemptions to permit abandonment, are granted without adequate analysis of the impact on shippers and the national interest. Our revenue adequacy standards continue to yield unrealistic results. And the settlement of numerous rate cases, which the majority finds "gratifying", probably resulted more from the Commission's delay in adopting standards for maximum reasonable rates than from any genuine meeting of the minds.

With appropriate funding and staffing levels, I feel this Commission is capable of fully implementing the reforms of the Staggers Act in a manner consistent with legislative intent. Furthermore, because many features of the Staggers Act demand a weighing and balancing of various interests, implementation of this important Congressional policy is best left to an objective, impartial independent agency. I cannot join those of my col-

leagues who support the Administration's proposal to sunset the ICC and transfer our rail responsibilities to the Department of Transportation. The Commission has served this country well over the past 100 years and , with suitable guidance, will continue to do so in the future.

COMPARATIVE INDUSTRY ROE RANKINGS

FOR 1978 THROUGH 1986

(Ranked in 1986 Order)

Industry	1986		1985		1984		1983		1982	
		%		%		%		%		%
Tobacco	1	21.5	1	23.2	4	18.8	2	18.5	1	20.2
Beverages	2	21.0	3	19.1	8	17.0	3	17.9	4	17.2
Drugs	3	20.4	4	18.7	3	19.4	1	19.6	2	19.2
Pub/Radio/TV	4	20.2	2	20.4	6	18.0	5	16.8	6	16.6
Food Processing	5	19.8	8	16.6	9	16.3	16	13.4	11	13.5
Savings & Loan	6	18.9	9	16.0	29	9.8	15	13.7	38	-14.2
Food & Lodging	7	15.9	6	17.3	7	17.2	8	16.6	8	15.5
Automotive	8	14.0	5	18.5	1	24.3	6	16.7	35	-4.0
Personal Care	9	13.8	14	13.9	16	14.5	4	16.9	5	16.7
Trucking	10	13.5	15	13.3	12	15.5	9	15.6	20	10.7
Building Mat	11	13.2	17	12.0	23	11.4	31	7.2	33	2.8
Nonbank Finance	12	12.8	27	9.0	33	8.9	21	11.9	18	12.3
Misc Manufact	13	12.7	22	10.4	17	14.2	25	10.4	23	10.2
Retail Non Food	14	12.7	16	13.2	13	15.3	12	15.1	21	10.4
Electrical	15	12.6	18	11.8	10	16.3	14	14.4	9	15.1
Retail Food	16	12.3	10	15.7	15	14.9	11	15.2	15	12.9
Containers	17	12.0	21	11.2	24	10.5	30	7.7	28	7.7
Appliances	18	11.9	11	15.2	11	16.2	18	12.9	27	7.9
Chemicals	19	11.7	35	1.4	22	11.5	28	9.0	26	8.3
Textile/Apparel	20	11.6	30	8.1	26	10.4	17	13.1	24	9.2
Off Equip/Comps	21	11.5	12	14.7	5	18.1	7	16.6	7	15.9
Utilities	22	11.3	20	11.5	19	13.1	22	11.7	17	12.7
Banks	23	10.6	19	11.6	32	9.2	23	11.6	16	12.7
Service Ind	24	10.4	24	10.0	18	13.9	19	12.7	13	13.0
Telecommunications	25	10.3	--	--	--	--	--	--	--	--
Paper/Forest Prods	26	9.9	29	8.2	31	9.5	32	7.0	31	3.9
Leisure Time	27	9.5	26	9.1	27	10.4	34	4.0	10	14.1
Aerospace	28	9.4	7	16.9	2	20.3	10	15.3	14	12.9
Real Estate/Housing	29	9.4	13	14.3	35	7.8	13	14.9	29	6.3
Instruments	30	8.5	25	9.8	14	14.9	24	10.7	22	10.3
Nat Resources	31	7.6	23	10.4	21	12.5	20	12.3	12	13.1
Airlines	32	6.3	32	6.7	30	9.8	36	-2.5	37	-8.9
Special Machinery	33	4.2	33	5.5	38	.6	37	-3.2	34	.0
RAILROADS	34	4.2	31	7.7	25	10.4	26	10.2	25	8.7
Metals & Mining	35	3.5	39	-12.6	39	-1.5	38	-3.2	36	-5.8
Tire & Rubber	36	3.5	36	1.1	28	9.8	29	8.4	30	5.3
Gen Machinery	37	1.1	34	2.7	34	8.2	35	1.1	32	3.8
Conglomerates	38	-1.4	28	8.9	20	13.1	27	10.0	19	10.8
Oil Service/Supply	39	-21.5	37	1.0	36	6.5	33	6.7	3	18.0
Steel	40	-29.9	38	-2.5	37	1.3	39	-21.4	39	-19.0

Data for telecommunications industry does not exist prior to 1986.

1986 railroad ROEs exclude certain special charges taken during the year which significantly reduced net income. These excluded special charges are for the railroads only and do not exclude special charges for non-rail operations.

SOURCE: BUSINESS WEEK (Annual "Corporate Scoreboard" Issues)

COMPARATIVE INDUSTRY ROE RANKINGS

FOR 1978 THROUGH 1986

(Ranked in 1986 Order)

Industry	1981	1980	1979	1978
	%	%	%	%
Tobacco	2 19.9	3 21.5	7 20.5	9 19.7
Beverages	10 15.4	13 17.0	28 14.6	32 13.2
Drugs	3 18.7	5 20.1	5 20.8	4 20.4
Pub/Radio/TV	6 17.2	33 8.3	3 21.3	2 20.9
Food Processing	15 14.9	18 15.6	26 15.4	27 14.8
Savings & Loan	39 -8.6	35 6.1	27 15.4	14 18.4
Food & Lodging	7 17.1	10 18.5	17 17.1	17 18.1
Automotive	37 -4.0	39 -11.1	35 11.3	19 16.8
Personal Care	5 17.7	9 19.1	13 18.2	7 20.0
Trucking	21 13.9	23 14.6	20 16.9	1 21.4
Building Mat	36 7.0	32 10.9	24 15.6	18 16.9
Nonbank Finance	18 14.5	17 15.9	18 17.1	11 18.8
Misc Manufact	17 14.6	15 16.3	11 19.3	21 16.0
Retail Non Food	26 12.5	31 11.5	30 14.5	26 14.9
Electrical	9 15.9	7 19.3	9 19.7	12 18.6
Retail Food	14 15.1	24 14.5	25 15.5	24 15.4
Containers	31 10.7	27 12.9	32 13.4	35 12.1
Appliances	30 10.8	28 12.7	36 9.3	22 15.7
Chemicals	23 13.1	21 15.3	19 17.1	28 14.4
Textile/Apparel	28 11.4	29 12.7	31 13.5	34 12.7
Off Equip/Comps	12 15.2	8 19.2	8 19.8	5 20.4
Utilities	20 14.0	26 12.9	34 12.8	33 12.7
Banks	22 13.6	22 14.9	29 14.6	29 14.3
Service Ind	16 14.9	4 20.5	12 19.3	16 18.2
Telecommunications	-- ----	-- ----	-- ----	-- ----
Paper/Forest Prods	29 11.0	30 12.6	15 17.7	23 15.5
Leisure Time	13 15.2	14 16.4	14 18.0	10 18.8
Aerospace	8 15.9	6 19.5	1 21.7	6 20.3
Real Estate/Housing	35 7.1	11 18.3	4 21.0	15 18.4
Instruments	24 12.7	19 15.4	23 15.9	25 15.3
Nat Resources	4 18.6	2 23.8	2 21.5	30 13.9
Airlines	38 -5.9	38 -.3	38 6.8	8 20.0
Special Machinery	27 12.5	25 13.4	21 16.5	13 18.4
RAILROADS	25 12.5	36 3.9	33 12.9	37 9.3
Metals & Mining	34 9.0	12 18.1	10 19.4	36 10.0
Tire & Rubber	33 9.2	37 3.7	37 7.8	39 5.4
Gen Machinery	19 14.1	20 15.3	16 17.5	20 16.3
Conglomerates	11 15.4	16 16.1	22 16.0	31 13.5
Oil Service/Supply	1 24.8	1 24.2	6 20.6	3 20.5
Steel	32 9.4	34 7.8	39 5.4	38 7.8

Data for telecommunications industry does not exist prior to 1986.

SOURCE: BUSINESS WEEK (Annual "Corporate Scoreboard" Issues)

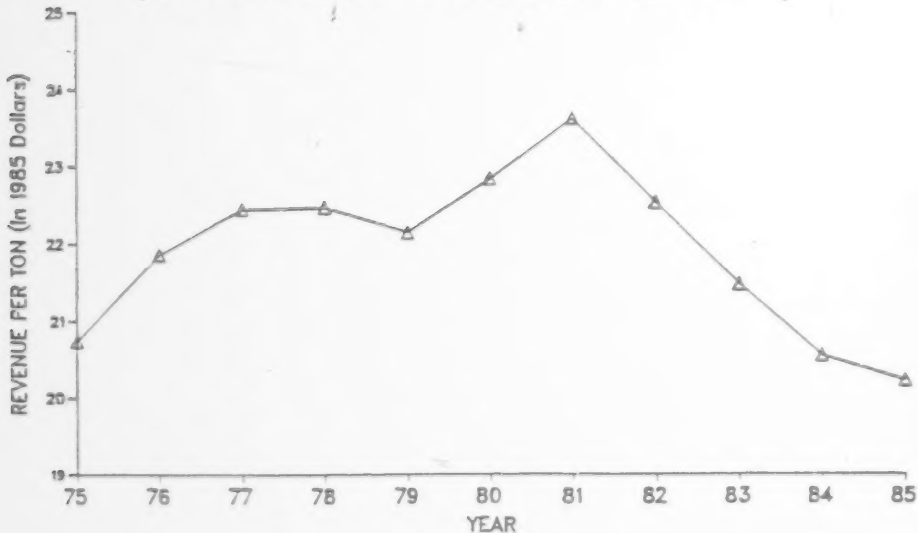
RAIL RATES HAVE DECLINED SINCE STAGGERS

The following graphs show recent trends in inflation adjusted rail rates overall and for each of the seven major commodities that constituted 73% of total rail freight in 1985. The remaining 27% of rail traffic is grouped together as the final graph. Results are remarkably consistent. Rates were rising before Staggers and since then the increase has slowed and been reversed.

Average revenue per ton of freight carried by class I railroads is the rate measure chosen. This approach allows virtually all rail traffic to be included in the measure rather than just a small sample. In addition, it captures the effect of rate reductions made possible by the use of contracts and multi-car shipments. Railroads have used the pricing freedom of Staggers to offer contracts and volume discounts that allow more efficient service. In this way, shippers and railroads share the benefits of Staggers.

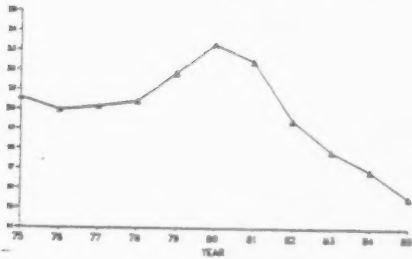
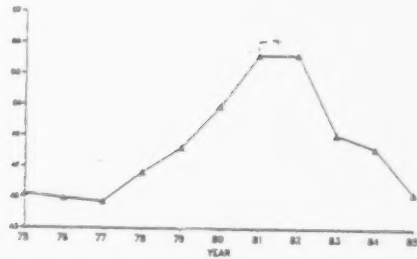
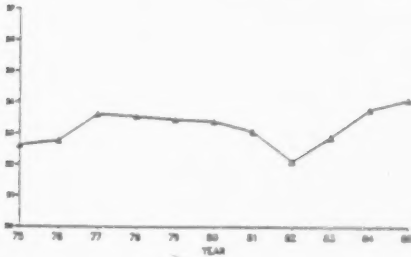
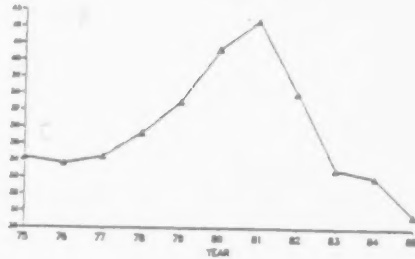
Revenue per ton was used in an effort to be conservative. In recent years the average distance shipped on Class I railroads has increased, from 616 in 1980 to 664 miles in 1985. As a result, using revenue per ton makes the rail rate picture look worse (or not as good) as it really is.

AVERAGE FOR ALL COMMODITIES
1975 - 1985
(IN CONSTANT DOLLARS PER TON*)



*DEFLATED USING GNP DEFULATOR.

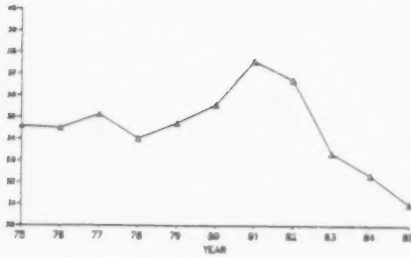
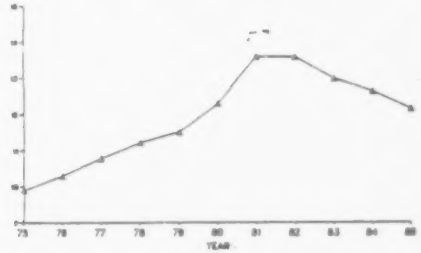
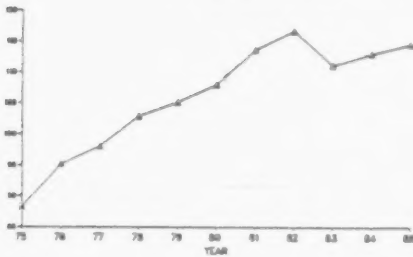
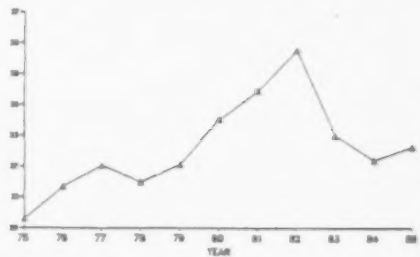
REVENUE PER TON IN 1985 DOLLARS*

FARM PRODUCTS
1975 - 1985PAPER AND PULP
1975 - 1985LUMBER
1975 - 1985FOOD
1975 - 1985

Farm products, paper and pulp, and food all had sharp drops in rates after Staggers which followed increases in the earlier years. Revenue per ton dropped 33%, 11%, and 24%, respectively for these commodities between 1980 and 1985. The only major commodity which has not shown any real improvement since Staggers is lumber. Revenue per ton did drop immediately following Staggers but has since increased. Lumber is also the lowest rated of the major commodities. Its average revenue is barely over variable cost.

*DEFLATED WITH GNP DEFLATOR

REVENUE PER TON IN 1985 DOLLARS*

CHEMICALS
1975 - 1985COAL
1975 - 1985TRANSPORTATION EQUIPMENT
1975 - 1985ALL OTHER COMMODITIES
1975 - 1985

Chemicals, coal and all other commodities showed the typical pattern of increases prior to Staggers and decreases afterwards. Between 1980 and 1985 revenue per ton dropped 12% for chemicals and 4% for all other commodities. During that period the reduction for coal was only 1% but between 1981, when coal revenue per ton peaked, and 1985 the reduction was 11%. Transportation equipment (mostly automobiles and parts) failed to decline but the sharp escalation prior to Staggers was halted. Revenue per ton, which has increased as a result of shifts to smaller cars and just in time shipments, peaked in 1982.

*DEFLATED WITH GNP DEFLATOR

Comparative 1985 Rates of Return
Before and After adjustment
For Depreciation and Deferred Taxes
Per Ex Parte 393 (Sub-No. 1)

	Before (Old Rules)	After* (New Rules)
B&O	-2.92%	-1.17%
B&M	-0.36%	2.05%
C&O	-2.52%	-0.10%
Conrail	3.76%	6.08%
D&H	-8.97%	-4.74%
EJ&E	0.13%	-1.56%
GTW	-1.34%	1.64%
N&W	5.12%	9.05%
FEC	5.50%	5.47%
ICG	-2.69%	2.37%
SBD	-1.28%	1.29%
SOU	5.90%	8.06%
AT&SF	1.36%	4.29%
BN	7.97%	10.29%
C&NW	-1.40%	0.43%
D&RGW	2.59%	5.62%
KCS	7.51%	9.23%
MKT	2.10%	2.17%
MoPac	3.40%	6.21%
SLSW	4.00%	3.19%
Soo	2.28%	1.46%
SoPac	-4.64%	0.67%
UnPac	4.69%	7.34%
WePac	-7.87%	-3.22%

* Does not reflect all of the modifications adopted by the Commission in Ex Parte No. 393 (Sub No. 1). The impact of two modifications (one relating to combined data for Class I carriers under common control and the other relating to consolidated data for the Class I carrier and its rail-related subsidiaries) could not be determined since the required information is not presently reported by the railroads.

Attachment D

Recent Public Utility Estimates
Of Return on Equity

Utility Decisions Sep-Dec 85

Utility Name	Date	ROE Requested	ROE Received
Brooklyn Union Gas	9/85	16.2	13.8
NY Telephone	10/85	16.2	14.0
Oklahoma Gas	12/85	16.8	14.5
Sou Bell Georgia	9/85	16.5	15.0
Duke Power	9/85	16.3	14.9
Atlanta Gas	9/85	17.3	15.3
Monagahela Power W VA	10/85	16.0	14.0
Bell Penn	10/85	16.5	15.2
Sierra Pacif Power Nev	10/85	16.8	14.3
Ohio Bell	12/85	16.6	14.6
San Diego Gas & Elec	12/85	16.5	15.0
AVERAGE		16.5	14.6

SOURCE Public Utilities Fortnightly, Various Issues, Jan-Feb 86

Senator DECONCINI. Mrs. Gradison, thank you very much. Your testimony was very helpful. I want to compliment you for the work that you and the Commission have done since the last time you appeared before the committee. It was very frustrating at that time for this senator, as I suspect it was for you, because of the lack of information we had and lack of records.

I compliment you and the other Commission members. You have been very helpful. Your testimony indicates a conscientiousness on your part to attempt to get a better handle and control over the Commission which has been kind of a sticking point for a number of us for some time.

Ms. GRADISON. Understandably so.

Senator DECONCINI. Fair or unfair, it appeared that the Commission was not doing its job, and I think that that has improved immensely.

It is true, is it not, that the Commission lacks jurisdiction to order one railroad to grant trackage rights to another except in a very limited basis?

Ms. GRADISON. That is correct.

Senator DECONCINI. And what is that limited basis that you can grant trackage rights? Mr. Campbell?

Mr. CAMPBELL. The statute gives the Commission the authority to grant trackage rights in the context of terminal facilities usage. If the Commission orders joint terminal facilities usage it has the right to order trackage rights for a reasonable distance outside of the terminal.

Senator DECONCINI. And what in your judgment is a reasonable distance? Has that been determined?

Mr. CAMPBELL. The only case that comes right to mind was under 10 miles.

Senator DECONCINI. So you do not have anything further than that as far as trackage rights is concerned then.

Mr. CAMPBELL. Not unless there are trackage rights agreements that are made mutually between two railroads. We can approve those but we cannot mandatorily order anything, no.

Senator DECONCINI. Mrs. Gradison, it is also true, is it not, that for whatever reasons the ICC cases frequently take as long or longer than antitrust cases of comparable complexity?

Ms. GRADISON. That may have been true while we were trying to put our rules in place. However, in the last year we had three rate reasonableness cases before us. Two of the three have been resolved. The third one is pending and we expect to have resolved shortly.

So that may have been the case while the Commission grappled with the difficulty of creating the rules, and having those rules upheld by the courts. When I testified before you last year I submitted for the record what the Commission had gone through in order to develop our Ex Parte No. 347 (Sub. No. 1) coal rate guidelines.

Senator DECONCINI. How long does it take for the typical ICC case?

Ms. GRADISON. Today it takes less than a year.

Senator DECONCINI. You may not be able to comment on some pending cases, but I am aware of an Arizona electric case filed in 1981 which is still pending.

Ms. GRADISON. Yes, sir. And I thought that might come up, so I brought the who-shot-John on it.

Senator DECONCINI. Do you have a decision on that case today?

Ms. GRADISON. I wish I did. Let me tell you what I do have. I am not sure I want to submit this for the record, but I will submit it for your view. It is three pages of who-shot-John on the case since last April 10th.

Senator DECONCINI. On this particular case I made reference to?

Ms. GRADISON. Yes, sir. I had an opportunity to close the record about three weeks ago, and I had an opportunity to provide for final clarification of the record if I extended it for 30 more days. And in view of the fact that the parties had been through this much already, I decided to provide the opportunity for final clarification in the record.

I hope and expect to have a decision on this before Labor Day. My staff has briefed your staff on this particular case. The courts were gracious enough to lay a decision upon us this week vilifying our attempt to move the case for the pre-1982 portion of it. That will be included in the portion that we are handling, and the case in its entirety will be resolved.

Senator DECONCINI. That is very encouraging.

Ms. GRADISON. Let me say one of the biggest problems is that the statute continued to change. And each time the statute change, the regulatory scheme had to change. And each time the regulatory scheme changes, it then goes to the courts. And then the courts send it back and the scheme changes again, and on it goes.

And I would plead to you to review what we as an agency have done in this last year with our firm resolve to provide a balance and to provide results, and to be supportive of a continuation of the Staggers Act as we have it today.

Senator DECONCINI. In your opinion, barring this legislation, would it be a good tool if the ICC had trackage rights—the right to grant extensive orders?

Ms. GRADISON. I think it would be chaos. I truly believe it would be chaos.

Senator DECONCINI. Is that because you would have so many cases or what?

Ms. GRADISON. Under what circumstances should the Commission provide trackage rights? Is that not a seizure of property? Should we allow—

Senator DECONCINI. If there is a monopolist that is recalcitrant and refuses to provide the public access, that is part of your job. So under some circumstances you might feel that it was in the best interest of the public if you grant trackage rights. Notwithstanding technically that it is seizing somebody's property, but the ICC is doing it because the public is suffering severely.

Ms. GRADISON. We find that less than 20 percent of rail traffic is captive to rail. The other 80 percent is competitive to other modes or other products. And my concern is that with the differential pricing scheme, each dollar that the competitive products provide to the railroad's bottom line helps keep the captive products' rates

down. And my concern is that ultimately there would be no incentive for reinvestment in the rail system with mandatory trackage rights.

Senator DECONCINI. Do I understand you correct, you are willing to trade off the 20 percent captive rates because they help pay for the 80 percent——

Ms. GRADISON. No, that is just the opposite; the 80 percent help pay for the 20 percent, because they support the entire system.

Senator DECONCINI. And you feel justified in your own mind that 20 percent captive rates is in the best public interest?

Ms. GRADISON. No, sir, that is why the Interstate Commerce Commission exists. We are there for the backstop. We are there to make the reparation awards in the event there is abuse for those 20 percent or less of captive shippers.

And that is why my testimony was extensive in referring to what the Commission has done in the last year. Because though I am known and on record as a deregulator and I believe that the best role for the government is a very limited role, when we must be there, we should do an efficient and fair and balanced job. And that is exactly what we have done through the course of the last 15 months.

Senator DECONCINI. If you are the backup as you say, the last resort so to speak, and you are only to act if there is abuse and a case is made showing abuse, part of your decision process could be granting some trackage rights. Why would that not be a good tool, particularly under your philosophy, which I happen to agree with, that you should not be over-regulating, you should be the backup, the last resort. Why would not trackage rights, if the statute so provided, be a good tool for a conscientious member such as yourself to use when you felt that there was abuse?

Ms. GRADISON. What I prefer to see, and you will have to hear me out on this, is a new construction exemption which provides the opportunity to construct a link, a connection, a means of providing competition where there is none.

Senator DECONCINI. Build another line you mean.

Ms. GRADISON. That is right. And sometimes it merely takes the threat of new construction to provide the captive shipper with a more reasonable rate. But the Commission has, at this time, under consideration a proposal that would provide for an exemption of new construction. And it seems to me that that might be a more democratic way to pursue——

Senator DECONCINI. Do you think that would be an economical way? When there is a valid line already there? Given the scenario that you have determined there is an abuse.

Ms. GRADISON. It depends on how far the line would have to be constructed.

Senator DECONCINI. How far do you think would be justified; 20 miles, 100 miles?

Ms. GRADISON. We are looking at it, we are considering it. You are absolutely right, the economics are a tremendous concern. Sometimes a short distance of construction can provide the opportunity for access to a second, third or fourth rail carrier that a shipper may not have at this time.

But I do find that type of negotiation to be preferable than requiring the use of another's facilities.

Senator DECONCINI. Your judgment is that would be more practical and as economical?

Ms. GRADISON. It may not necessarily be either. And that is why it is still on the drawing board.

Senator DECONCINI. Thank you.

Ms. GRADISON. Thank you.

Senator DECONCINI. Thank you very much for your testimony.

Our next witness will be a panel of three people, Mr. William Dempsey, Association of American Railroads; Mr. Frederick Palmer, general manager of Western Fuels Association; and Mr. Paul M. Donovan, LaRoe, Winn & Moerman of Washington, DC.

Gentlemen, thank you for being here. It reminds me, about a year or so ago, it seems like we went through this before, but it was very educational to me. We will start with you, Mr. Dempsey. If you would like to submit a statement, we will put the full statement in the record and if you could summarize it for us.

STATEMENT OF WILLIAM H. DEMPSEY, ASSOCIATION OF AMERICAN RAILROADS, WASHINGTON, DC, ACCOMPANIED BY J. THOMAS TIDD, VICE PRESIDENT OF LAW, ASSOCIATION OF AMERICAN RAILROADS, WASHINGTON, DC; FREDERICK D. PALMER, GENERAL MANAGER, WESTERN FUELS ASSOCIATION, INC., WASHINGTON, DC; AND PAUL M. DONOVAN, OF LaROE, WINN & MOERMAN, WASHINGTON, DC

STATEMENT OF WILLIAM H. DEMPSEY

Mr. DEMPSEY. I have with me Mr. J. Thomas Tidd, who is our Vice President of Law, at the Association.

Senator DECONCINI. What is the name?

Mr. DEMPSEY. Tidd, T-i-d-d. These are sometimes arcane subjects that I am not able to deal with accurately.

I am grateful to be here to give the views of the industry on this bill, which is of course, as the witnesses have indicated, somewhat different than the bill that we addressed last time. But still, as I am sure you appreciate, the railroad industry opposes the bill essentially for two reasons.

The first is that we think that it discriminates against the rail industry, in that we think that it would put the rail industry in a different position than any other industries that are subject to the Keogh doctrine and Section 16 or its counterparts in other legislation.

It seems to us that if that is good public policy for the railroads, it ought to be good public policy for everybody else, and you ought to consider it in those lights.

But secondly, and I guess perhaps more importantly, it seems to me that the basic notion that we are dealing with here is that the railroads have been deregulated and that, in respects that they have been deregulated, they are not controlled by the Commission, nor are they subject to the Antitrust laws. Therefore, there is a lacuna that ought to be dealt with. We just do not think that notion is right.

It is not as accurate or proper reading of the Staggers Act.

Let me say this to begin with, and I guess I will finish up on this, too, with this thought. There is a perfectly straightforward way to deal with this problem. The Keogh doctrine and Section 16 proviso and its counterparts in other acts are built fundamentally upon the notion of avoiding a collision between regulatory authorities and the antitrust courts.

If the notion is that the railroads are somehow escaping both, then the thing to do, I suggest, is to just repeal the Interstate Commerce Act and get rid of the Commission and subject the railroads fully to the antitrust laws. That would do it, really, because just automatically, the railroads would not have the protection of the Keogh doctrine nor the proviso in Section 16.

Senator DECONCINI. Would you support that?

Mr. DEMPSEY. If that were the proposal, I would take it immediately to my board and recommend it. I will say to you that I personally would support that and I think that the experience under the Staggers Act indicates that that is a perfectly reasonable way to proceed. We are subject to so much competition out there that our rates have gone down since the Staggers Act was enacted. Basically, Mr. Chairman, our position has been and is that we want to be treated like every other industry in the United States that is similarly circumstanced.

If that is something that the shippers would support and the Congress would consider, as I say I do not have my board's authority, but personally I would support that.

Just talking about the two issues, the Keogh and the Section 16 proviso, in terms of the first issue that I raised, discrimination against the railroads. As you well know, the Keogh doctrine was enunciated in 1922 and the Supreme Court reaffirmed it as to motor carriers in the *Square D* case last year. It has also been held to apply to electric utilities, to telecommunications, to airlines, to securities, and to agriculture. All of those decisions we have collected for your scrutiny and are attached to my testimony.

It is hard for me to understand why, if Keogh is going to continue to be available to all those other industries, it should not continue to be available to the railroad industry. But let me get to the merits of that in a minute.

As to Section 16, the collision between the bill and the Interstate Commerce Act is apparent on the face of the Section 16 proviso. The proviso says that you cannot get injunctive relief against any common carrier if the relief is requested, "in respect of any matter subject to the regulation, supervision or other jurisdiction of the Interstate Commerce Commission."

So the bill says, in effect, even though we are talking about a matter that is subject to the Interstate Commerce Commission, there can be injunctive relief granted just with respect to railroads, not with respect to motor carriers or barges, our principal competitors, and not with respect to the other industries that, in effect, have been dealt with in the same way. And I will not go through this catalog which is also attached to my testimony.

It is all, as I say, in my statement. When the Clayton Act was passed the ICC was the only regulatory agency that existed. Since then the Congress has dealt with the same problem of collision in different ways and different acts. So what we have is the McCar-

ron-Ferguson Act applying to insurance, the Shipping Act to ocean carriers, Federal Communications Act to telecommunications, the Aviation Act, the Securities Act and others all of which have comparable provisions designed to avoid a collision between the regulatory agency and the antitrust courts.

Now let me just deal for a minute or two with respect to the issue that, really, the railroads are no longer regulated and therefore there ought to be no antitrust immunity. As I said before, if that is true, then I think that is a good solid position to hold. It is not true.

Two issues I will deal with. One is rates. What has happened to the regulation of rates under Staggers? The second is competitive access, which you have been talking about with other witnesses. These are not easy issues. I do not mean to suggest that they are.

Where we have captive shippers, the rates are subject to full control by the Interstate Commerce Commission. So I do not think that is an issue. But there are three different situations in which the rates are not fully subject to control of the Commission. The first is where the rates fall below the jurisdictional threshold that the Congress set in the Staggers Act. What the Congress said was those rates are presumptively competitive, so the Commission has no control over them as to their maximum reasonable level.

Even though they are under the threshold, what if they are the result of a conspiracy of some sort? Now what happens? As Mr. Rule said, the level of the rates would never be the subject of an antitrust complaint because the courts do not say, and they have never said, that all right, just because the rates are at this level, that shows a violation of the antitrust laws.

The question is, what have the parties done? Here is what the law provides, and I lay it out in detail in my statement, and I will just summarize it very swiftly. Let us take a conspiracy. That would violate Section 10706 of the Interstate Commerce Act. What is the remedy? Well, I must confess to you that I did not read the Supreme Court's decision in—what is it, the ATA case—until this morning and I was shocked at reading it because the remedy that the Supreme Court approved there was, I think I have Mr. Justice Marshall's quote, "may even exceed the treble damages to which carriers are vulnerable under the antitrust laws." Indeed, the effect of the Commission's proposed new remedy which the Supreme Court approved, is to convert the ICC into the federal government's most potent enforcer of the antitrust laws.

Well, I did not agree with the majority, but as Justice Frankfurter, I think said at one time, the dissenting opinion is just subversive literature, so that is what we have in that area.

The ICC can deal with any attempt to monopolize by prescribing joint rates or through routes under the authority of Sections 10705, 10707; it can deal with discrimination under Section 10741; predatory rates under Section 10701a. So, we have a panoply of remedies under the existing Interstate Commerce Act to deal with all of these issues that could otherwise be raised under the antitrust laws.

With respect to traffic which the Commission has exempted entirely from regulation, it is my personal judgment that Keogh would not apply to those rates. They are not filed with the Com-

mission. It is my personal opinion, and I am just speaking personally now, that injunctive relief would probably not be available under Section 16 because the Commission can revoke that exemption and therefore I would think that the railroads would argue that those rates are still subject to the jurisdiction of the Commission and that revocation is tantamount to an injunction. But since they are not filed, treble damages would be available.

In the case of contract rates, which are not filed with the Commission and, once effective, cannot be challenged before it, my judgment would be that neither Section 16 proviso nor Keogh would be applicable.

So what I am saying essentially, Mr. Chairman, is that where there has been, in fact, deregulation of rates under Staggers, then the antitrust laws are generally available. It is only where there has not, in fact, been deregulation that Keogh and the proviso to Section 16 apply.

I really am exhausting my time and probably your patience, so let me say just a word, as to competitive access.

I will just say that the existing statutory framework provides a thorough basis for the Interstate Commerce Commission to deal with competitive access problems. A railroad cannot refuse to serve a shipper. We start with that. A railroad cannot refuse to deal with a connecting road, that is second. Third, a railroad can be compelled, by the Commission, to establish joint rates, which is really the *Ottertail* kind of situation. Next, the shipper can specify the route, either a single line route or a through route or whatever route he wants.

Then, as I think you discussed with one of the other witnesses, there can be the compulsion by the ICC to establish trackage rights within the terminal area, and for a reasonable distance outside, and reciprocal switching.

So where we come out on this is that if you read the 700 pages of Title 49, it seems to me difficult to conclude that the railroads are not regulated in all respects. Now, maybe not the way that everyone would like them to be regulated, but they are regulated. Therefore, the intrusion of the antitrust laws does create conflict. Take reciprocal switching, just to draw one case.

A shipper in another railroad says we want reciprocal switching. It goes to the Commission. The Commission says it is not in the public interest, but then the shipper goes to the antitrust court, and the court says well, indeed, there is a monopoly so we order reciprocal switching upon some terms or another.

It is that kind of collision that Section 16 proviso and Keogh were designed to prevent and it is fundamentally for that reason that we oppose the bill.

I thank you for your consideration.

[The prepared statement follows:]

Testimony of William H. Dempsey, President
of the Association of American Railroads,
Before the Antitrust Subcommittee of
the Senate Judiciary Committee on S. 443

May 13, 1987

Mr. Chairman and members of the Subcommittee, I appreciate this opportunity to present the views of the Association of American Railroads on S. 443, a bill introduced by Senator DeConcini, that would amend the Clayton Act to remove railroads from the protection of the Keogh doctrine and the anti-injunction proviso in section 16 of that Act. A companion bill (H.R. 941) has been introduced in the House by Congressman Synar. S. 443 would single the railroad industry out for exposure to treble damage remedies based on rates filed with regulatory agencies while retaining for other regulated industries protection from such exposure. It would further discriminate against the railroads by leaving other freight carriers within the protection of the section 16 proviso. Such discriminatory treatment is unwarranted particularly where, as here, it rests on assertions that the railroads have been "deregulated" and that, as to matters in which they are not regulated, neither are they subject to the antitrust laws. Both of those propositions are demonstrably in error.

The Effect of the Proposed Legislation

The Keogh Provision. Section 2(a) of S. 443 would amend section 4 of the Clayton Act by adding a subsection (d) stating that "A common carrier by rail shall not be immune from damages under this section." The effect of this provision would be to subject the railroads to treble damages for antitrust violations based on rates that have been filed with, and even approved by, the Interstate Commerce Commission (ICC).^{*} In a 1922 decision (Keogh v. Chicago and N.W. Ry. (260 U.S. 156 (1922))), the Supreme Court ruled that it would create an irreconcilable conflict between the Interstate Commerce Act and the antitrust laws to permit treble damages for violations of the antitrust laws, as provided in section 4 of the Clayton Act, in cases where damages are based on differences between rates filed with the ICC and

^{*} By using the language "shall not be immune" the provision could, arguably, be read to remove from the railroads any existing antitrust immunities. It is assumed that the intended effect is only to make the treble damage remedy available where there is no immunity for the act constituting the violation and that the choice of words is inadvertent. A contrary assumption would carry the effect of the bill far beyond that professed by its sponsors.

hypothetical alternative rates. The Court stressed that the lawfulness of railroad rates was to be determined by the provisions of the Interstate Commerce Act under which the filed rate is the legal rate unless rejected by the ICC, and that a court could not establish a measure of damages based on a filed rate without deciding that, absent the antitrust violation, a different rate would have been lawful under the Interstate Commerce Act--a matter committed by Congress to the ICC. The Court further stressed the different and conflicting remedial schemes of the Interstate Commerce Act and the antitrust laws.

In so holding, the Court was not leaving antitrust violations by railroads unpunished--the government has full powers under the antitrust laws to enjoin the anticompetitive conduct and to bring criminal charges. The Court was only holding that a shipper was limited in obtaining redress for overcharges as a result of rates set in violation of the antitrust laws to the single damages or other remedies available to it under the Interstate Commerce Act.

Keogh involved railroad rates but the doctrine established in that case has been applied generally to regulated industries for the past 65 years. Indeed, the Supreme Court's affirmation of Keogh in 1986 came in a case involving, not railroads, but motor carriers who had filed with the ICC rates set by an illegal conspiracy. (Square D Company, et al. v. Niagara Frontier Tariff Bureau, Inc. et al. 106 S.Ct. 1922 (1986) See Attachment 1 for a list of some of the cases in which Keogh has been stated or held to apply to regulated industries other than those regulated by the ICC (electric utilities, telecommunications, airlines, securities and agriculture).

The Section 16 Proviso. Section 16 of the Clayton Act permits private parties to obtain injunctive relief from threatened loss or damage due to a violation of the antitrust laws. The section contains a proviso, however, prohibiting injunctive relief for any person other than the federal government "against any common carrier subject to the [Interstate Commerce Act]" if the relief is requested "in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission." Section 2(b) of S. 443 would insert the phrase "(other than a common carrier by rail)" after the words "common carrier" as they appear in the preceding sentence. By excluding railroads from this proviso, the effect of section 2(b) would be to subject the railroads--and only the railroads--to

the dual jurisdiction of the courts and the ICC as to the same matters.

At the time section 16 was enacted (1914), the Interstate Commerce Act was the only independent federal regulatory statute in existence. The obvious purpose of the proviso was to avoid a conflict in the administration of two bodies of regulatory law—the antitrust laws administered by the courts and the Interstate Commerce Act administered by the ICC. The Supreme Court has described the proviso's purpose as being to "preclude any interference by injunction with any business or transactions of interstate carriers of sufficient public significance and importance to be within the jurisdiction of the Commission, except when the suit is brought by the Government itself." (Central Transp. Co. v. Term. R.R., 288 U.S. 469, 475 (1933)) The Court observed in a later case that if someone allegedly injured by the acts of a regulated carrier could sue for an injunction under the Clayton Act "...the unity of the system of regulation breaks down beyond repair." (Georgia v. Pennsylvania R. Co., 324 U.S. 439, 455 (1945))

The absence of references to other regulatory agencies in the section 16 proviso does not mean that the congressional policy of avoiding dual jurisdiction between the courts and the regulatory agencies started and stopped in 1914. In the case of regulatory agencies created subsequent to 1914, the dual jurisdiction problem has instead been dealt with in other Acts or by judicial interpretation.

The failure of the Congress to amend the proviso to exclude matters subject to the jurisdiction of federal regulatory agencies created after 1914 was explained in International Tel. & Tel. Corp. v. General Tel. & Electronics Corp., 518 F.2d 913, 919-920 (9th Cir. 1975), as follows:

When Congress enacted the § 16 proviso it obviously intended to prevent disruption of the ICC's regulatory scheme by private parties seeking to enjoin activities of regulated carriers.... Subsequent Congressional efforts to preserve the integrity of regulatory schemes have taken the form, not of extension of the partial protection afforded by the § 16 proviso, but rather of full antitrust immunity for transactions approved by specified agencies....

This change in approach represents a rational policy choice to grant full immunity under specified conditions rather than partial immunity under all conditions.

Some examples of the subsequent congressional efforts to which the court refers are the McCarran-Ferguson Act (insurance), the Shipping Act (ocean carriers), the Federal Communications Act (telecommunications), the Federal Aviation Act, and the Securities Act. (See Attachment 2)

The Arguments Made in Support of the Proposed Legislation

It Is Argued That the Railroads Are Largely Deregulated. Various arguments have been advanced in support of this legislation to repeal Keogh and the section 16 proviso only insofar as they are applicable to railroads. Among others:

- The railroads are no longer pervasively regulated but they still have antitrust exemptions grounded on the old regulatory framework.
- Since the railroads are largely deregulated there are no fair arguments against fully applying the antitrust laws.
- The continuation of Keogh and the section 16 proviso is incompatible with the deregulation of the railroad industry that occurred with the Staggers Act.
- The railroads have been freed of virtually all constraints against charging excessive rates to captive shippers.

All of these arguments rest on faulty factual premises.

The fact is that a railroad rate remains fully subject to regulation by the ICC where there is found to be an absence of effective competition, i.e., the railroad has "market dominance." So, contrary to the assertions of the legislation's advocates, the Staggers Act did not relieve the railroads of any constraint with respect to charging rates above competitive levels. The railroads' rate levels are regulated as fully today as they were before the Staggers Act except in four respects:

- (1) In Staggers, the Congress added a conclusive presumption that rates below a certain revenue-to-variable cost percentage (now 180) were constrained by competition so the ICC could not find such rates to be above competitive levels. The ICC retained its full powers to find unreasonably high a rate above the 180 percent level.
- (2) The ICC was given the power to exempt traffic from regulation if it found that (a) the exemption would further the policies of the Act and (b) there was not a likelihood of an abuse of market power by a railroad with respect to such traffic.
- (3) The railroads were authorized to enter into contracts with shippers and, once approved, those contracts were no longer subject to ICC jurisdiction and could be reviewed only by a court.
- (4) The railroads were authorized to raise rates as necessary to keep pace with inflation as determined by an inflation index to be developed

by the ICC. Shippers were given an opportunity upon enactment of Staggers to challenge the reasonableness of any existing rate to which the inflation index could be applied.

The extent to which antitrust remedies remain available in the above instances varies. Thus:

1. Filed rates that are either below the jurisdictional threshold of 180 percent of variable cost or based on increases in the inflation index have been declared by statute as not to exceed a lawful maximum level because they are presumptively competitive or required to cover cost increases due to inflation. The antitrust laws do not provide a remedy for a claim that a price is too high, whether that price is set by a regulated or an unregulated firm. To be actionable under the antitrust laws the price must be accompanied by anticompetitive conduct.

Thus, Keogh and section 16 are irrelevant to disputes as to the maximum reasonableness of rates set below the jurisdictional threshold of 180 percent or pursuant to increases in the inflation index. However, such rates are subject to the Commission's jurisdiction as to all matters other than their maximum reasonableness and as to which antitrust claims might arise. Thus, a conspiracy to set such rates at a particular level would violate section 10706 of Title 49, U.S. Code. An attempt to monopolize by cancelling a joint rate or through route or by refusing to deal or engaging in a price squeeze could be enjoined by the Commission, regardless of its level, under sections 10705 and 10707. If the claim were that the rate was discriminatory, the complaint could be heard by the Commission under section 10741. If the claim were that the rate was predatory (below a reasonable minimum), the complaint could be heard under section 10701a. In such cases, the continued protection of the railroads against dual regulation by the Commission and the antitrust courts which Keogh and the section 16 proviso affords is plainly appropriate.

2. To the extent traffic is exempt from ICC regulation, the Keogh doctrine would not apply to the rates applicable to that traffic because those rates are not filed with the Commission and there is no alternative rate subject to regulation. Consequently, if a shipper were to bring an antitrust action involving that traffic, treble damages based on the difference between the exempt rate and some other rate would not be barred by Keogh. Injunctive relief generally would not be available, however, because the ICC does retain

jurisdiction over exempt traffic and can revoke the exemption and reassert regulation.

3. To the extent traffic is subject to contract rates, shippers would have access to antitrust remedies for anticompetitive actions arising out of the contract. Generally, section 16 and Keogh would not bar either injunctive relief or damages.

In sum, where there has in fact been deregulation of railroad rate levels, the antitrust laws are generally available--and it follows that, where there has not in fact been deregulation, the protection against dual regulation afforded by Keogh and the section 16 proviso should remain in place.

It Is Argued That the Proposed Legislation Would Only Treat Railroads Like All Other Industries Are Treated. Various arguments have been advanced in defense of the claim that the proposed legislation does not discriminate against railroads. Thus, it is asserted that:

- The legislation is not designed to single out the railroads for special treatment, but only to make sure that the same rules which apply to other industries apply to railroads as well.
- The legislation is designed only to permit captive shippers to go to court and hold the railroads accountable to the same standards as other industries.
- The legislation would only subject railroads to the same antitrust law principles that govern all other American businesses.
- The legislation would not put the courts into the rate-making business nor have the courts treat a railroad differently than any other business that is sued for antitrust violations.

These assertions are incorrect with respect to the treatment of railroads vis-a-vis both other regulated industries and non-regulated industries.

As noted above, Keogh has general application to industries which file their rates with regulatory agencies. Under the proposed legislation, the railroads would be the only industry with regulated rates to which Keogh did not apply. As also noted above, many regulated industries not included in the section 16 proviso are protected by other statutes or by judicial doctrine from injunctive relief by the judiciary in matters subject to regulation by a federal agency. Indeed, other industries regulated by the ICC (the motor carriers, water carriers and freight forwarders)—which include the railroads'

principal competitors--would continue to be protected by the section 16 proviso. The railroads would be the only industry regulated by the ICC that was not protected.

In its amicus brief to the Supreme Court in the Square D case in which it urged the Court not to overrule Keogh, the telecommunications industry described the substantive impact of an overruling on other regulated industries:

Petitioners...urge the Court to decree a substantial expansion of the treble damage remedy as a matter of regulatory policy and the public interest. In doing so, however, they ignore the kind of substantive impact that such a change in the law would have.

A distillation of the factual scenario present in Keogh demonstrates that similar disputes are susceptible to frequent occurrence in the context of several federally regulated industries, not just the motor carrier and other ICC-regulated industries but also in areas such as telecommunications. First, a regulated firm files a tariff in substantial compliance with the regulatory procedural requirements--a tariff which reflects the carrier's perception of the regulator's public interest goals. The regulator has full authority to disallow the tariff if it does not meet the statutory 'public interest' requirements and may institute a proceeding to do so on its own motion or at the suggestion of a third party. Next, the tariff becomes effective. Subsequently, a user that has not achieved the result it desired before the agency or that decided simply to ignore the regulatory process in its entirety goes into federal court in the hope of recovering treble damages, probably for itself and classes of other users, based upon a tariff which has never been disallowed or even questioned by the agency charged with the primary responsibility to supervise, approve and reject such tariffs.

If the Court now for the first time were to fashion such a cause of action, the lure of treble damages and attorney's fees would create a potent incentive for customers of regulated utilities to bypass the regulatory process and, instead, to seek redress in the federal courts. (Underscoring supplied)*/

The proposed legislation would have the Congress declare that the result described in the telecommunications industry's brief was tolerable for the railroads but not for any other regulated industry.

With respect to unregulated industries, the antitrust laws do not provide any remedy merely for the charging of a monopoly price by a monopolist. The exercise of lawfully acquired monopoly power has never been held to violate the antitrust laws. The courts have repeatedly held that a lawfully acquired monopoly may charge what the market allows so long as it

*/ Motion for Leave to File and Brief of American Information Technologies Corp., Bell Atlantic Corp., Bellsouth Corp., Nynex Corp., Pacific Telesis Group, Southwestern Bell Corp., U.S. West Inc. and Their Telephone Operating Subsidiaries, at 15-16.

does not engage in predatory pricing, i.e., attempt to extend its monopoly.
(See Attachment 3)

To the extent a railroad has significant market power—few, if any, have actual monopoly power—it has lawfully acquired that power because construction, extension, acquisition, merger or consolidation of rail lines has been possible only with the approval of the ICC. Even if there were no regulation of rail rates by the ICC, a shipper could not prevail in an anti-trust action against a railroad simply by proving that, due to a railroad's market power, its rate was set above a competitive level. It would have to show some anticompetitive conduct by the railroad.

It Is Argued That the ICC Does Not Have Authority to Prohibit Railroads From Engaging in Anticompetitive Conduct. Proponents of the proposed legislation assert that:

- Railroads may demand unreasonable rates and threaten to cut off service to shippers who object.
- Captive shippers such as those of perishable commodities have no choice but to accede to the railroad's demands or face financial ruin.
- The ICC no longer has any effective power to prohibit anticompetitive railroad behavior or to compel competition in circumstances where no competition presently exists.

Such statements are plainly incorrect.

First, and foremost, a railroad generally cannot refuse to serve a shipper. Section 11101(a) of Title 49, U.S. Code requires a railroad to provide service "on reasonable request."

Second, a railroad cannot refuse to deal with a connecting road. Section 10703(a) of Title 49 requires railroads to "establish through routes with each other."

Third, a railroad can be compelled to establish joint rates for through movements via connecting railroads. Section 10705(a)(1) of Title 49 requires the ICC to prescribe such rates "when it considers it desirable in the public interest."

Fourth, the shipper can specify the railroad route over which its shipment is to move. Section 10763(a)(1) provides that the shipper "may direct the carrier to transport the property over [any] established through route."

Fifth, the ICC can compel the grant of trackage rights in terminal areas and for a reasonable distance beyond, and can compel reciprocal switching in terminal areas where practicable and in the public interest. (Section 11103)

Finally, if in fact the shipper is "captive" to a railroad (i.e., the railroad has "market dominance" as defined in section 10709 of Title 49), the ICC can limit the maximum rate being charged.*

The Sunkist Corporation is a supporter of this legislation and, as a shipper of perishable commodities, supposedly one who must "accede to the railroad's demands or face financial ruin." Far from being "captive" to the railroads, shippers of fresh fruits and vegetables such as Sunkist were so "non-captive" the ICC exempted all of that traffic from regulation eight years ago. This is the background:

- In 1951, the railroads handled 71% of all perishable traffic.
- By 1979, the railroads' share of that traffic had dropped to 10%—trucks handled 90%.
- In 1979, because of overwhelming truck competition, the ICC exempted railroads from regulation with respect to perishable traffic.
- Despite deregulation, the rail share of perishable traffic has continued to decline and is now only 6%.
- Because of truck competition, rail revenue from perishable traffic is only slightly above variable costs.

Claims of market abuse by shippers of perishable commodities such as Sunkist are ludicrous. If there is any refusal by a railroad to provide service to a shipper of an exempt commodity such as fresh fruits and vegetables it is only because the railroad could not make any money on the traffic at the price the shipper is willing to pay. And the reason the price the shipper offers is so low is due to competition—the traffic can easily move by truck. All the shipper faces is a decision as to which mode to

* Railroads may be exempted from the foregoing requirements only upon the specific finding that such requirements are not necessary to protect shippers against an abuse of market power, i.e., competitive alternatives are available.

use—hardly an anticompetitive problem. If in the unlikely circumstance a shipper of perishables could show that it was subjected to an abuse of market power by the railroad, it has an adequate remedy under the Interstate Commerce Act—revocation of the exemption.

It Is Argued That the Proposed Legislation Would Not Create a Conflict Between the ICC and the Courts. In introducing his companion bill in the House (H.R. 941), Congressman Synar asserted that there would be no conflict with the courts because:

- "One of the most important antitrust cases in the past twenty years, Otter Tail Power involved electric utilities, another regulated industry." That case "did not interfere with the jurisdiction of...the Federal Energy Regulatory Commission (FERC)."

The Otter Tail Power case involved an electric utility's refusal to deal with a municipally-owned electric distribution system by selling power to the municipality at wholesale prices or by "wheeling" power to it from another producer over the utility's transmission lines.

The reason the court's decision in that case did not conflict with the regulatory agency's authority was because the agency (FERC) did not have authority to order the utility to wheel power from another producer. But the ICC does have the requisite regulatory power with respect to railroads by virtue of the sections of Title 49 cited above. By analogy to the Otter Tail Power case, the owning railroad (the would-be grantor of trackage rights) would be the utility, the shipper would be the municipality, and railroad connecting with the owning railroad would be the connecting transmission company over whose lines, or from whom, the municipality wanted to purchase power.

Under the Interstate Commerce Act (49 U.S.C. 10703(a)), the owning railroad could not refuse to ship the goods (transmit the power) from a connecting carrier. Contrary to Mr. Synar's assertion, a court could not entertain an Otter Tail Power kind of action against a railroad without trampling all over ground reserved to the ICC by the Interstate Commerce Act.

As another example of the absence of any court/agency conflict arising from this proposed legislation, Congressman Synar, stated: "[E]ven

though the courts have jurisdiction over any antitrust violation by telephone companies, we don't find the courts interfering with long-distance rates approved by the FCC." The only reason the courts don't interfere with long-distance rates approved by the FCC is because the Keogh doctrine is applicable to such rates. Keogh protects every regulated industry from treble damage remedies for antitrust violations involving rates filed with the regulatory agency—and the proposed legislation would remove that protection only from the railroads.

The Position of the Department of Justice.

It has been noted in support of the proposed legislation that, while the Reagan Administration has not yet taken a position on it, the Justice Department supports the repeal of Keogh. It is true that Justice has supported the repeal of Keogh as it applies to all regulated industries. It has not supported the repeal of Keogh only as it applies to the railroads. In fact, with respect to the captive shipper issue to which the proposed legislation is addressed, the Department of Justice testified last year that the Keogh doctrine "has little, if anything, to do with captive shippers."^{*}/

With respect to the repeal of the proviso in section 16 of the Clayton Act, the Department testified:

We understand that the House Judiciary Committee considers repeal of the proviso in section 16, as key to solving the captive shipper problem. We would oppose repealing the proviso to section 16 because its repeal...would require courts to determine and continually supervise proper rates and charges in granting injunctive relief...[T]he ICC is in a far better position than are the courts to provide this type of relief. (Underscoring supplied)^{*}/

It's Time to Address the Real Issues.

If the public policy issues involved in the repeal of the Keogh doctrine and the proviso in section 16 are to be addressed in a rational manner, the Congress has to avoid the sophistry that somehow the railroads are not "really" regulated by the ICC and neither are they subject to the antitrust laws. One need only casually peruse the almost-700 pages of Title 49 of the United States Code Annotated to show the error in the first claim. As to the second claim one need only examine the statute and the case law to find that the railroads are subject to the antitrust laws except where express or implied immunities have been granted to avoid dual and potentially

^{*}/ Statement of Douglas H. Ginsburg, Assistant Attorney General, Antitrust Division, before the House Subcommittee on Commerce, Transportation and Tourism, June 5, 1986, at 12.

^{*}/ Id.

conflicting regulation by the ICC and the courts; and, in that respect, the railroads are treated essentially the same as all other regulated industries.

The effect of S. 443 is not to fill a void in the law—it is to provide a dual remedy to rail shippers. The result its supporters presumably seek is to allow a so-called captive shipper whose rates, routes and competitive relationships are subject to regulation by the ICC the option of also seeking treble damages or invoking a court's injunctive powers in actions founded on antitrust theories uniquely fashioned for the railroad industry. If this is their purpose, the bills are unsound both as a matter of antitrust law and as a matter of regulatory policy. But, more importantly, if such measures represent sound public policy, they should be made applicable to all regulated industries or, as the case may be, applied to all industries subject to the antitrust laws.

The truth of the matter is, of course, that the repeal of Keogh and the section 16 proviso do not represent sound public policy. Both of these exceptions to the antitrust laws arose from the recognition that dual regulation of an industry is not desirable because of the inherent certainty of conflict in the decisions of the regulators and, consequently, in the regulatory results. The Interstate Commerce Act provides shippers adequate remedies for all matters within the purview of the Act—some of which are not even available under, or go beyond those afforded by, the antitrust laws. In matters involving transportation a shipper has remedies not available with respect to any other aspect of its business—first and foremost, it can compel the provision of service and, in the absence of effective competition, it can get the price it pays for that service set by a government agency. Moreover, where regulatory remedies are not available, antitrust remedies are. Thus, there is no remedial void to be filled. Any justification of the proposed legislation ought to be based on what it in fact represents—a singling out of the railroad industry for dual regulation. Its supporters have yet to make that case.

In concluding, it should be noted that there is a straightforward way to accomplish the bills' professed objective of simply attempting to treat the railroads like every other unregulated business with respect to the antitrust laws. That would be to give reality to the claims of the legislation's supporters by removing the railroads from the application of the Interstate

Commerce Act. That approach would give all of those shippers who now claim they have no regulatory remedies at the ICC an unqualified license to pursue remedies, through the courts and the antitrust laws, for all of the unredressed anticompetitive injuries they now claim to be suffering at the hands of the railroad industry.

CASES APPLYING THE KEOGH
DOCTRINE TO OTHER INDUSTRIES

The following cases involving other regulated industries have stated or held that the Keogh doctrine bars certain damage actions in those industries:

Nordlicht v. New York Tel. Co., 799 F.2d 859, 866 (2d Cir. 1986), cert. denied, 107 S. Ct. 929 (1987) (customer action for money had and received against telephone company based on overcharges in filed tariffs barred by "filed tariff doctrine," for which Keogh was cited).

City of Groton v. Connecticut Light & Power Co., 662 F.2d 921, 929 (2d Cir. 1981) ("Under the Keogh or 'filed rate' doctrine, * * * a public utility subject to regulation is not subject to antitrust liability to its customers for rates or services provided under tariffs approved by the appropriate regulatory agency"; but Keogh inapplicable where suit is by competitors and the Federal Power Commission disapproved several of the rates at issue).

Essential Communications Systems, Inc. v. AT&T, 610 F.2d 1114 (3rd Cir. 1979) (FCC tariff scheme "indistinguishable" from the ICC tariff scheme at issue in Keogh, but Keogh inapplicable to suits by competitors rather than customers).

H.J. Inc. v. Northwestern Bell Tel. Co., 648 F. Supp. 419, 429 (D. Minn. 1986) ("filed rate" doctrine bars RICO claim seeking damages measurable by a comparison of approved rates and rates that would have been approved but for defendant's wrongdoing, citing Keogh).

Berning v. Gooding, 643 F. Supp. 26, 30 (D. Ore. 1985), appeal docketed, No. 86-3596 (9th Cir. Feb. 4, 1986) (antitrust damage action barred because "the statutory and regulatory framework" of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 et seq., "creates an implicit immunity to the antitrust laws under Keogh * * *. * * * Here, plaintiff may not bring an antitrust action based on a conspiracy to set rates already approved by the Secretary [of Agriculture].")

Greensboro Lumber Co. v. Georgia Power Co., 643 F. Supp. 1345, 1370 n.32 (N.D. Ga. 1986), appeal docketed, No. 86-8797 (11th Cir. Oct. 23, 1986) ("The regulatory system of filed, approved, and effective tariffs could not work if the parties governed by those tariffs could not obey them without fear of suffering antitrust damages or if regulatory decisions could be side-stepped by Sherman Act actions," citing Keogh).

In re Real Estate Title and Settlement Services Antitrust Litigation, 1986-1 Trade Cases (CCH) ¶ 67,149 at 62,933 (E.D. Pa. 1986) (approving settlement of a class action seeking antitrust damages and claiming that title insurance companies had conspired to fix prices for title search and settlement services in 13 states through membership in state-authorized rating bureaus, which submitted prices for such services for approval by the insurance departments in and of the affected states; the court cited "the filed tariff doctrine set out * * *

in Keogh * * * as presenting an obstacle to plaintiffs potential recovery and cited City of Newark v. Delmarva Power & Light Co., below, with apparent approval.)

City of Newark v. Delmarva Power & Light Co., 467 F. Supp. 763, 771, supplemental opinion, 1979-1 Trade Cases (CCH) ¶ 62,611 (D. Del. 1979) (Keogh and Georgia bar "an award of antitrust damages measured by the difference between the filed rate [i.e., filed with the FPC] and whatever rate this Court might determine would have prevailed but for a defendant's anticompetitive conduct").

Ditlow v. Pan American World Airways, 1976-1 Trade Cases (CCH) ¶ 60,867 (D.D.C. 1975) (No. 999-73) [aff'd per curiam, id. (D.C. Cir. 1976) (citing Keogh for proposition that "there can be no violation of plaintiffs' legal rights by defendant in respect to rates made pursuant to valid and effective tariffs" filed with CAB; granting summary judgment against plaintiffs in antitrust price fixing case).

Schaefer v. First National Bank of Lincolnwood, 326 F. Supp. 1186, 1191 (N.D. Ill. 1970), interlocutory appeal dismissed, 465 F.2d 234 (7th Cir. 1972), final judgment aff'd in part, rev'd in part on other grounds, and remanded (7th Cir. 1974), cert. denied, 425 U.S. 943 (1976) (citing Keogh in ruling that plaintiffs failed to state an antitrust cause of action for damages for stock market manipulation "[w]here specific damage provisions are contained in regulatory statutes," there the Securities Exchange Act of 1934).

McClellan v. Montana-Dakota Utilities Co., 104 F. Supp. 46 (D. Minn. 1952) (suit for damages challenging natural gas rates, in part on antitrust theory barred, citing Keogh), aff'd on other grounds, 204 F.2d 166 (8th Cir.), cert. denied, 346 U.S. 825 (1953).

See also Pennsylvania Water & Power Co. v. Federal Power Comm'n, 193 F.2d 230, 236 (D.C. Cir. 1951), aff'd, 343 U.S. 414 (1952) (applying Keogh in ruling that rates approved by Federal Power Commission may not be subject to judicial review if FPC properly exercised its jurisdiction on substantial evidence, even if certain related conduct violated the antitrust laws).

The Keogh doctrine of course also applies to other industries regulated by the ICC. Apart from trucking industry, at issue in the Square D litigation, see e.g.:

Paulson v. Greyhound Lines, Inc., 804 F.2d 506, 507-08 (8th Cir. 1986) (Keogh precluded action against bus common carrier for breach of warranty or breach of contract for a time-specific delivery, in light of published tariff).

Minsky v. Auto Driveaway, 757 F.2d 718 (7th Cir.), cert. denied, 105 S. Ct. 435 (1984) (treble damage action against companies providing "casual automobile driveaway services" subject to the jurisdiction of the ICC barred by Keogh).

Related cases apply the so-called "filed rate" doctrine to bar damage actions without citing Keogh, e.g.:

Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981) ("filed rate" doctrine forbids a state court to calculate damages in a breach-of-contract action based on an assumption that had a higher rate been filed, the FPC would have approved it).

See also Nantahala Power & Light Co. v. Thornburg, ____ U.S. ____, 106 S. Ct. 2349, 2355 (1986) (applying "filed rate" doctrine as establishing that interstate power rates filed with FERC or fixed by FERC must be given binding affect by state utility commission determining intrastate rates; "[the complaining company] can claim no rate as a legal right that is other than the filed rate * * *," quoting Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246, 251 (1951)).

EXPRESS AND IMPLIED IMMUNITIES IN REGULATED INDUSTRIES
 COMPARED TO THE "IMMUNITY" AGAINST INJUNCTIVE RELIEF
 GIVEN BY THE CLAYTON ACT § 16 PROVISIO

Section 16 of the Clayton Act generally authorizes suits for injunctive relief in the federal court against threatened loss or damage by a violation of the antitrust laws. The proviso states that § 16 shall not be construed to entitle anyone, except the United States, to bring "suits in equity for injunctive relief against any common carrier subject to" the Interstate Commerce Act "in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

Since 1914, when § 16 was enacted, Congress generally has not taken the approach of the § 16 proviso with respect to other regulated industries: that is, (a) prohibiting injunctive relief by private parties, (b) permitting injunctive suits by the United States, and (c) permitting private damage actions (or leaving the availability of damage relief to other legal doctrines, such as the Keogh doctrine). A closely analogous provision, however, does appear in the Shipping Act of 1984. Under 46 U.S.C. § 1706(c)(2), no person may recover damages under Clayton Act § 4 or obtain injunctive relief under Clayton Act § 16 for "conduct prohibited by" the Shipping Act of 1984. This provision is broader than the § 16 proviso in that it covers damages too, but somewhat narrower in that it applies only to conduct prohibited by the Shipping Act, rather than subject to the "regulation, supervision, or other jurisdiction" of the FMC.

Instead of enacting such provisions that are closely analogous to the § 16 proviso for other regulated industries, Congress since 1914 has generally enacted express immunity provisions, where it has deemed appropriate. These express immunity provisions, where applicable, grant more complete relief from the antitrust laws than the § 16 proviso, since they prohibit actions by the United States and private damage actions, as well as private injunctive actions. For example:

Ocean Shipping: The Shipping Act of 1984 grants
 express immunity for filed and exempt agreements and for

actions pursuant thereto (whether permitted or prohibited by the Shipping Act), and for filed tariffs. 46 U.S.C. § 1706(a).

Insurance: Under § 2(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), the antitrust laws do not apply to "the business of insurance to the extent that such business is * * * regulated by State law." This express immunity is qualified by § 13(b), 15 U.S.C. § 1013(b), which provides that insurance companies remain subject to the antitrust laws with respect to acts or agreements "to boycott, coerce, or intimidate."

Agricultural Cooperatives: Clayton Act § 6, 15 U.S.C. § 17, grants immunity from the antitrust laws for agricultural or horticultural organizations when engaged in price-fixing, though not for other conduct that would violate the antitrust laws. See Maryland & Virginia Milk Producers Ass'n v. United States, 362 U.S. 458 (1960).

Telecommunications Common Carriers: There is express immunity for approved mergers and consolidations. 47 U.S.C. § 221(a).^{1/}

Moreover, in some situations where there is no express immunity, the courts have found that Congress intended an implied immunity from the antitrust laws. Such immunity, while not set forth in an express statutory provision, is generally as complete as an express immunity. That is, it prevents private and governmental injunctive actions and private damage actions.

Securities: The Supreme Court has held that antitrust immunity should be implied where necessary to avoid a substantial danger of subjecting persons "to duplicative and inconsistent standards," United States v. National Ass'n of Securities Dealers, 422 U.S. 694, 735 (1975), either because of "the pervasiveness of the regulatory scheme" or because of a "specific provision"

^{1/} Air Transportation: The Secretary of Transportation currently has the authority to exempt participants in certain approved mergers and acquisitions, interlocking relationships, and pooling arrangements from the antitrust laws. 49 U.S.C. §§ 1384, but this authority will expire in 1989. Id. § 1551(a)(6)-(7).

in the regulatory statute, Gordon v. New York Stock Exchange, 422 U.S. 659, 688-89 (1975). Thus, for example, the antitrust laws do not apply to the fixing of the commissions charged by stock exchanges and their members because "the fixing of reasonable rates of commission" is subject to oversight by the SEC under 15 U.S.C. § 78(b) (Gordon, 422 U.S. at 685), or to the marketing of mutual-fund shares, since 15 U.S.C. § 80a-22(d) "requires broker-dealers to maintain a uniform price in sales in [the] primary market" for such shares and 15 U.S.C. § 80a-22(f) gives the SEC statutory authority over "restrictions on the transferability or negotiability of mutual-fund shares" in the secondary market. National Ass'n of Securities Dealers, 422 U.S. at 699, 722.

Electric Utilities: While implied immunity was rejected in Otter Tail Power Co. v. United States, 410 U.S. 366 (1973), and Cantor v. Detroit Edison Co., 428 U.S. 579 (1976), the Court in Cantor acknowledged that there may be "situations in which the existence of state regulations should give rise to an implied exemption" from the antitrust laws if "the exemption was necessary in order to make the regulatory Act work * * *," 428 U.S. at 597.

Telecommunications Common Carriers: There is no general implied immunity, but courts have held that the FCC's regulatory authority is "relevant to the existence of monopoly power and may even prohibit a finding of such power as a matter of law," Mid-Texas Communications Systems, Inc. v. AT&T, 615 F.2d 1372, 1386-87 (5th Cir. 1980), and have stated that carriers may defend certain antitrust actions by showing that their conduct was based on a "reasonable belief" that it was required by the regulatory act. 615 F.2d at 1387-90.

Finally, in other situations where there is no express immunity, the courts have found that Congress did not intend a complete implied immunity,

but have nevertheless ruled that Congress intended courts to work some reconciliation between the antitrust laws and the regulatory statute in granting or enforcing injunctive relief. These doctrines are less protective than the § 16 proviso because they do permit some injunctive relief on matters within the scope of the regulatory authorities' jurisdiction, but they reflect the same Congressional policy that the regulatory regime should take precedence where it conflicts with injunctive relief otherwise available under the Sherman and Clayton Acts.

Electric Utilities: In affirming the injunctive relief in Otter Tail Power Co. v. United States, 410 U.S. 366 (1973), the court noted that in enforcing the injunctive relief, the District Court "presumably will give effect to the policies embodied in the Federal Power Act," 410 U.S. at 382, thus indicating that some reconciliation of the antitrust laws and the regulatory regime with respect to injunctive relief was necessary. See also City of Mishawaka, Inc. v. Indiana & Michigan Elec. Co., 560 F.2d 1314 (7th Cir. 1977), cert. denied, 436 U.S. 922 (1978) where the court observed:

"If plaintiffs prove their case, instead of interfering with any rates approved by the [FPC], in addition to possible damages, the district court would presumably order defendant to file a new wholesale rate application that would remove the disparity between the rates charged plaintiffs and defendants' industrial customers. The court would thus not be affording a remedy that would 'starkly conflict with the explicit statutory mandate of the [FPC] * * * [or] improperly preempt[t] the jurisdiction of the [FPC] * * *.' * * * [T]he district court intends to apply the antitrust laws 'to the public utility industry only to the extent that the antitrust claims asserted are not within the reach of the regulatory agency's supervision.' * * *." 560 F.2d at 1323-24.

On appeal after remand, the court of appeals reversed the injunctive relief on various grounds, including concern about consistency with the federal regulatory regime. 616 F.2d 976, 986-93 (7th Cir. 1980), cert. denied, 449 U.S. 1096 (1981).

MONOPOLY PRICING UNACCOMPANIED BY
ANTICOMPETITIVE CONDUCT
DOES NOT VIOLATE THE ANTITRUST LAWS

1. Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 294 (2d Cir. 1979):

"But unless the monopoly has bolstered its power by wrongful actions, it will not be required to pay damages merely because its prices may later be found excessive. Setting a high price may be a use of monopoly power, but it is not in itself anticompetitive. Indeed, although a monopolist may be expected to charge a somewhat higher price than would prevail in a competitive market, there is probably no better way for it to guarantee that its dominance will be challenged than by greedily extracting the highest price it can. See, e.g., L. Sullivan, supra, at 117; 3 P. Areeda & D. Turner, supra, at 41-42. If a firm has taken no action to destroy competition it may be unfair to deprive it of the ordinary opportunity to set prices at a profit-maximizing level. Thus, no court has required a lawful monopolist to forfeit to a purchaser three times the increment of its price over that which would prevail in a competitive market. L.M. Handler, supra, at 56-57. Indeed, as one commentator who might favor such a rule concedes, such judicial oversight of pricing policies would place the courts in a role akin to that of a public regulatory commission. Id. We would be wise to decline that function unless Congress clearly bestows it upon us. See L. Sullivan, supra, at 117-18." (Emphasis supplied)

2. Trace X Chemical v. Canadian Industries, 738 F.2d 261, 267-268 (8th Cir. 1984):

"In addition, to its allegations of price discrimination, Trace X contends that CIL's prices in the United States for TNT were too high, thus reflecting monopolistic pricing. However, setting a high price is not in itself anti-competitive. Berkey Photo, 603 F.2d at 294. See 3 P. Areeda & D. Turner, Antitrust Law 41-42, 148 (1978). Section 2 does not forbid a monopolist to set profit-maximizing prices. L. Sullivan, supra, at 116. Such conduct is not the exclusionary conduct that violates the antitrust laws, but rather is "the normal, rational response of a business...seeking to maximize profits, sales or revenues." Id. at 100."

3. Kartell v. Blue Shield of Massachusetts, Inc., 749 F.2d 922, 927-928 (1st Cir. 1984):

"[E]ven a monopolist is free to exploit whatever market power it may possess when that exploitation takes the form of charging uncompetitive prices. As Professor Areeda puts it, 'Mere monopoly pricing is not a violation of the Sherman Act.' P. Areeda, Antitrust Law §710 (Supp. 1982). The Second Circuit has recently held that 'more than monopoly power is necessary to make the charging of a noncompetitive price unlawful.' Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 297 (2d Cir. 1979, cert. denied., 444 U.S. 1093, 100 S.Ct. 1061, 62 L.Ed.2d 783 (1980)). Cf. Monsanto Co. v. Spray-Rite Service Corp. ___ U.S. ___, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984).

"The reasons underlying this principle include a judicial reluctance to deprive the lawful monopolist

(say a patent monopolist) of its lawful rewards, and a judicial recognition of the practical difficulties of determining what is a 'reasonable,' or 'competitive' price. See 2 P. Areeda & D. Turner, *Antitrust Law* §§ 512-14 (1978); 3 *Id.* ¶710; R. Bork, *The Antitrust Paradox*, 125-29 (1978)."

4. 3 Areeda & Turner, *Antitrust Law*, pages 148-150 (1978):

¶710. Exploitative Pricing

"Monopoly pricing and monopoly profits should not be deemed either an 'exclusionary' act or an 'abuse' of monopoly power under §2.

* * * * *

"...[W]e do recognize that rivalry will not be attracted by the market or created by antitrust law where monopoly power is inevitable or irremediable because it rests on scale economies or indivisible natural advantages or otherwise. Even so, however, there are serious theoretical and practical difficulties in determining what is 'reasonable' non-monopoly price, as the history of public rate-making makes painfully manifest.

"The perfectly competitive equilibrium price is equal to long-run marginal cost, but this formulation does not state the price to be expected when cost, demand and technological functions are constantly changing. We would hesitate, moreover, to require a monopolist to choose a price at his peril and indeed at greater peril than is faced by most less-than-perfectly-competitive firms in our economy. And whatever may be said for the concept of 'fair return' on 'prudent investment,' it certainly is not self-administerable by the monopolist. There are too many open questions in defining the rate base, proper expenditures, and the rate of return. Even full-time regulators have great difficulties administering such formulae, and they hardly touch the critical matters of costs and innovation. Antitrust courts have rightly resisted undertaking the heavy, continuous, and unguided burden of supervising the economic performance of business firms.

"The reasons given by the Supreme Court in rejecting a 'reasonable price' defense to a price-fixing agreement are equally apposite here:

The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions. Moreover, in the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable—a

determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies.

"The courts correctly regard as uncongenial and foreign to the Sherman Act the burden of continuously supervising economic performance."

5. Sullivan, Antitrust, pages 116-118 (1977):

"We have considered predatory pricing (along with other predatory activity) which may be used either to gain or hold monopoly power. Are there other pricing practices by the established monopolist which are legally sensitive? Does a monopolist which obtained power lawfully violate Section 2 (become guilty of monopolization) if it exploits its power by pricing at any of the supra-competitive levels which it might rationally choose?

* * * *

"The argument for construing Section 2 as forbidding the monopolist to charge 'monopoly prices' would be based in part on authority and in part on policy. The case law and legislative history both emphasize the dread of excessive prices, and the Act is unquestionably aimed at forestalling prices above competitive levels and resulting distortions in the allocation of resources. Construing the Act to forbid pricing above competitive levels thus has a surface appeal. But the considerations which weigh against it are forceful; indeed, overwhelming.

"First, authority: the cases emphasize that monopolization consists of the exercise of monopoly power in ways which tend to exclude competitors. Profit maximizing monopoly prices tend the other way. Such pricing may not always attract entry; if entry barriers are sufficiently high it cannot. However, such pricing will do more to attract competitive entry than would any other pricing policy a monopolist might adopt.

* * * *

"Note also that a rule against short-run profit maximizing monopoly prices would be difficult to administer judicially. Just as it would be difficult to determine predatory pricing by objective tests, so it would be difficult to determine objectively what would be a reasonable non-monopoly price for the purpose of forbidding monopoly pricing. To do so, moreover, would require an enormous resource commitment, even if it were a feasible task to bring off. Courts would be asked to act like public utility commissions, policing the business decisions of every patent monopolist, every firm dominating a thin market, and every holder of a scarce resource to see that prices did not yield more than a reasonable return on investment.

"The reasonable price standard is intrinsically vague and difficult. The most efficient way to show that prices are higher than competitive levels would

presumably be to show that profits are higher than necessary to attract investment. But the reasonable return on investment will vary from industry to industry depending on risk, the extent of innovation, secular trends of demand, and other factors. Courts do rely on profit evidence at times and make judgments about the reasonableness of profits as a subsidiary test of the existence of market power. But if reasonable prices, as indicated by reasonable profits, were accepted as a conduct standard for the firm lawfully possessing monopoly power, an added difficulty would be presented. Any determination made today about what price is reasonable would not hold for tomorrow, when demand or supply conditions might change. Consequently, effective enforcement of the rule would require a continuous scrutiny which it is not feasible for courts to undertake.

* * * *

"In summary, no single consideration clearly forecloses a construction of Section 2 which would forbid the monopolist to set profit maximizing prices. But the objections to such a construction are numerous and forceful and, in the aggregate, demand the conclusion that the law ought not to be so interpreted."



ASSOCIATION
OF AMERICAN
RAILROADS

William H. Dempsey
President

June 2, 1987

The Honorable Howard M. Metzenbaum
Chairman, Subcommittee on
Antitrust, Monopolies, and Business Rights
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I have reviewed and returned the transcript of the hearing May 13 before your Subcommittee on S. 443. At the hearing, I told Senator DeConcini that I would like to respond in writing to his questioning now appearing on pages 52 and 53 of the transcript.

I made the point in my testimony that S. 443 was discriminatory in that it subjected only the railroads to the injunctive provision in section 16 of the Clayton Act and withdrew only from the railroad industry the protection afforded by the Keogh doctrine. Senator DeConcini queried me as to why the railroads would be concerned that their competitors continued to enjoy the protection of section 16 and asked, specifically: "If there was an agreement to have high prices, how is that going to hurt you?"

It may well be that a conspiracy by a group of motor carriers to raise their rates would not injure the railroads; but a conspiracy by such a group to lower their rates for predatory purposes certainly could. There are, of course, a variety of actions motor carriers could take against the railroads to frustrate the interchange of intermodal traffic which could have serious anticompetitive effects. Under S. 443, such actions would not be enjoined by the railroads. If, however, anticompetitive acts were committed by the railroads against motor carriers, those acts could be enjoined by the motor carriers. That is the core of the equity argument against S. 443.

The antitrust laws constitute a court-imposed regulatory system. When that system is overlayed on an industry that is already regulated, that industry's competitors are inherently advantaged because they have greater freedom of action in the marketplace. And, to come back to the point I made at the hearing, there is a serious issue of equity involved here. On what grounds can the Congress single out the railroad industry from all other regulated industries with respect either to the Keogh doctrine or the section 16 proviso?

I would appreciate having this letter inserted at the appropriate point in the hearing record.

Sincerely,

W. H. Dempsey

Senator DECONCINI. Mr. Dempsey, thank you.

You argue that this bill will single out for special treatment the railroads. But it is true that motor carriers and railroads are very different. I am sure you agree with that, or do you agree with that?

Mr. DEMPSEY. Well, they are physically different, but in terms of the market, they are the same.

Senator DECONCINI. Barriers to enter for motor carriers are low as compared to what they are in the railroads, you would agree with that?

Mr. DEMPSEY. Yes, I do agree with that.

Senator DECONCINI. And the highway system, in essence is open to everyone?

Mr. DEMPSEY. Yes.

Senator DECONCINI. The trucking industry is virtually incapable of monopolization, I think. Do you agree with that?

Mr. DEMPSEY. Yes.

Senator DECONCINI. So do you not see how your comparison could not be the same? Why should you not be similar to the highway system and the motor carriers?

Mr. DEMPSEY. Well, I think that would be fine. That is what I am asking for. That is to say Keogh applies to the motor carrier industry and Section 16 proviso applies to them and so what I am asking is that we be treated the same.

Senator DECONCINI. No, but you are asking that you not be singled out for special treatment by this bill, is that not correct? Your statement says this bill singles this out?

Mr. DEMPSEY. Right, because the motor carriers would have Keogh, as they do, and would have the proviso to Section 16, as they do, and the railroads would not.

Senator DECONCINI. So you say that if you had the same applications as the motor carriers, you would be satisfied?

Mr. DEMPSEY. No, Mr. Chairman, I did not—if I suggested that, I did not mean to say that. What I meant to say was that the Congress, if they want to repeal Keogh, if you want to repeal Keogh and the proviso, that you ought then to treat all industries that are subject to Keogh and the Section 16 proviso the same and look at it in that context.

I am sure that the motor carriers would introduce whatever arguments they have. My arguments are the ones that I have made. On the merits, we would still oppose it because of the collision between the Interstate Commerce Act and the antitrust laws with again the exception that if you wanted to repeal the Interstate Commerce Act, I feel pretty confident that we would be glad to go under the antitrust laws.

Senator DECONCINI. Along that line, I do not understand why you should be concerned that some of your competitors would continue to enjoy the protection of Section 16. If your competitors conspire against themselves to raise prices, how could you possibly be hurt yourself, if your competitors with Section 16?

Mr. DEMPSEY. If no injunctions were available against them?

Senator DECONCINI. Right.

Mr. DEMPSEY. It is a good question.

Senator DECONCINI. Conspired for high prices.

Mr. DEMPSEY. Yes, a price fixing conspiracy out there someplace.

Senator DECONCINI. If there was an agreement to have high prices, how is that going to hurt you?

Mr. DEMPSEY. Let me take that in kind of two steps because I think the price fixing conspiracy part of this, because of the ATA decision in the Supreme Court that I referred to, is not a major item. It appears to me that under the Commission's rules and the Supreme Court's decision that the sanctions against both the motor carriers—and it was a motor carrier case—and the railroads, are severe and perhaps more severe than treble damages.

So I kind of put that to the side.

But I am not certain about that because it was a five to four decision in the Supreme Court and Justice Marshall wrote it in a fairly careful way, and so no one knows exactly how that would come out in future cases.

In terms of injunctive relief, I do not know. I mean, that is really the issue that we are talking about, and I want to give that more thoughtful consideration, Senator. I think it is a matter of equity. It seems to me that if we are competitors, the barges are, the motor carriers are, the railroads are, we all ought to be treated the same way. But I would appreciate the opportunity to respond to that.

Senator DECONCINI. Yes, if you would care to give us some thoughts on that, that concerns me.

I have a couple of questions that I would like to go over with you, but time is running short here.

Mr. Palmer, would you like to give your statement? We will put your full statement in the record. Do you want to summarize it for us?

STATEMENT OF FREDERICK D. PALMER

Mr. PALMER. It is a pleasure to be here today, Mr. Chairman and I want to compliment the subcommittee on all the hard work that has gone into this bill.

Before I give you a summary of my testimony, Mr. Chairman, and react to a couple of things that have been stated here today by representatives of other organizations, I would like the opportunity to acknowledge other organizations that have worked with us in supporting this legislation, the American Public Power Association and the National Rural Electric Cooperative Association.

Many of our members are members of those organizations. In addition to that, the Midwest Electric Consumers Association has been of great help in this regard.

For the record, Mr. Chairman, let me explain briefly once again the nature of Western Fuels. We are a fuel supply cooperative and coal is our business. In 1986 we moved approximately 13 million tons of coal to nine power plants owned and operated by our members in the west, the midwest, and the southwest.

We did this from two mines that we own our selves and from other producers, where we purchased coal on a wholesale basis.

This coal was moved on five class one railroads and two of our own railroads, one electric and one diesel and we deal with the railroads on a day to day basis.

We have been supportive of this legislation because we think it is a step in the right direction towards making the rail industry more competitive, which we think is a terribly important proposition. When we talk about competition, Mr. Chairman, we talk about rail on rail competition and not rail competition versus other modes of moving coal, which is usually more expensive.

I think the experience that shippers of coal from the Wyoming coal fields, where we now have rail on rail competition for a portion of the Powder River Basin, underscores the terribly important aspect of competition in this business, where rates have been cut dramatically.

I think the nature of the competitive environment that exists there also points to the serious flaws that exist with the current regulatory regime under the Staggers Act.

It was with great interest that I listened to Chairwoman Gradyson this afternoon addressing the subject. First, I want to say it is with some gratification that we have learned that the Commission now has no objection to overturning Keogh. I think that is an important step and recognizes the economic reality that exists in the industry today.

Second, I think it is extremely encouraging that she indicated they are at least willing to consider a repeal of Section 16, under appropriate circumstances, and I think that if the staff of the subcommittee sits down and deals with this matter with the agency, that you will find there really is not the potential for conflict that she seemed concerned about and Section 16 should go as well.

I think it should be pointed out, though, that aggressive regulation by the Interstate Commerce Commission, under the Staggers Act as it exists today, really is not an answer to the problems that we deal with on a day to day basis, as a business. The problems we deal with are defined by the presence or absence of competition and I can tell you that the railroads that we deal with, when there is true rail on rail competition, are aggressive. They want the business and the terms and conditions under which they will do it are both dramatically different and more favorable to the shipper than when the converse is true, when you do not have competition.

This applies no matter the railroad. You do not have a good railroad or a bad railroad. You have railroads that are operating in a competitive environment or that are not. It is human nature, in a business context, to take advantage of the economic leverage that you have.

One of the things we have been arguing so strongly for is to make the leverage more equal by making the playing field more competitive.

If the ICC regulated aggressively, with respect to maximum reasonable rates for coal—and we do not think that the standards they have in place represent aggressive regulation—but even if they did, that is not the answer for the need for this legislation because the Staggers Act itself sets jurisdictional minimums that produce monopoly returns. The new movements that we are dealing with today, in a competitive environment, produce rates at revenue to variable cost ratios that are far below the jurisdictional minimum set in the Interstate Commerce Act.

And I, as a shipper and as a business person, could never agree to a regime that set forever a government intervention only when rates were at the rate levels set in the Staggers Act, or 180 percent of revenue to variable cost. These rates are monopoly rates and they are far above anything going on in the competitive environment that you can find yourselves in, in certain parts of the west.

I think the second part of this problem is the competitive access problem. I think the Commission here today indicated to you their limited jurisdiction with respect to granting trackage rights.

Western Fuels itself is involved in a proceeding in front of the Interstate Commerce Commission, involving a subsidiary of ours and our Illinois mine. There was an Administrative Law Judge decision that was handed down last week that would, if affirmed by the Commission, grant us trackage rights for a 26 mile stretch of track coming out of our Brushy Creek mine, so called, in southern Illinois to an interchange with the Missouri Pacific Railroad near Benton, Illinois.

So I did not want the Commission statement today to say that the prior precedent has been ten miles or under, to be one that goes in this record, because we have a new one and the new one is 26 miles. But nonetheless, it is limited.

One of the options there would be is the construction option and Ms. Gradison addressed that today. But as the Chairman correctly noted, the construction option is a terribly expensive option, to have to build a spur line to get competitive access.

In the case of the Illinois situation, it is one that we looked at. For the mileage in question, it would cost approximately \$15 million for us. We have limited tonnage to move over that. It would be very difficult to amortize it and that kind of a bottleneck situation is one that the railroads can exploit to realize monopoly returns.

The bill, as it stands today, would not necessarily result in either lower rates or competitive access, Mr. Chairman, and I understand the reason why the legislation this year is limited versus what it was last year.

We, nonetheless, are supporting what I would regard to be a less aggressive and more limited posture. But it is, for sure, a step in the right direction, because the antitrust laws are laws that change over time and they evolve in the economic environment that we all have to do business with.

And I will guarantee you, Mr. Chairman, that if these laws were put on the books, that every railroad that does business in the country with their captive shippers would take a hard second look at the way they have treated those shippers because for the first time the shippers would have the incentive to go after this activity, and that is the treble damage action. And that is the pot of gold for the shippers, and the only thing that will motivate a shipper is an economic return, to undertake the tremendous investment that would be involved in bringing such an action.

But I do not think that would come about. I think the railroads would be responsive because of the new threat that would be presented by allowing the shippers to engage in that kind of activity if this legislation is enacted.

Mr. Chairman, any questions that you may have, I will cease now.

[Statement follows:]

TESTIMONY

ON

S.443, the CLAYTON ACT AMENDMENTS
OF 1987

SUBCOMMITTEE ON ANTITRUST, MONOPOLIES AND BUSINESS RIGHTS
SENATE COMMITTEE ON THE JUDICIARY

by

FREDRICK D. PALMER, GENERAL MANAGER,
WESTERN FUELS ASSOCIATION, INC.

May 13, 1987

Mr. Chairman. It is a distinct pleasure to be able to testify today in support of S.443, the Clayton Act Amendments of 1987. My name is Fredrick D. Palmer, and I am general manager of Western Fuels Association, (Inc.).

As you know, the first congressional hearing on the predecessor bill of S.443 was held by the Senate Committee on the Judiciary in 1984, and Western Fuels testified at that hearing.

It takes more than one Congress and more than one series of hearings to make the case fully for most legislative proposals, but I believe now that captive rail shippers, aided by the leadership from members of the Judiciary Committees of the Senate and the House of Representatives, have just about completed the task.

There is a serious captive shipper problem that can be adequately corrected only by enacting into law the two changes in antitrust law proposed by S.443. Five previous hearings in this Committee have amassed facts and illustrations strongly supporting the view that captive shipper problems have been and are being caused by anticompetitive actions by railroads, encouraged by failure to bring antitrust laws up to date at the same pace that pervasive regulation was being eliminated.

I commend the Subcommittee on Antitrust, Monopolies and Business Rights for addressing this matter early in the first session of the 100th Congress, as well as the Judiciary Committee member sponsors of S.443, Senators DeConcini and Alan K. Simpson.

Western Fuels, I should explain, is a not-for-profit fuel supply cooperative which was incorporated under the laws of the State of Wyoming. It has 35 consumer-owned electric utility

members across the West, Midwest and South, and supplies coal to many of the members that generate their own power. We own a mine in southern Illinois and another in northwestern Colorado, and we purchase additional supplies under contracts with major coal producers in Wyoming, New Mexico and Montana. We are perhaps the largest single buyer of coal from the Powder River Basin in Wyoming.

We also arrange rail transportation for that coal and monitor the performance of the five railroads that provide this service for our members. It has given us some special pertinent insights to the problems of shippers of bulk products when they are captive to a single railroad that I want to share with the Subcommittee. We have dealt with monopoly railroads for more than 10 years, and we understand the difficulty of the task when there is neither prompt and effective regulation nor antitrust law for protection from excessive freight rates.

I have been involved personally in negotiations with several railroads over a period of years, and this fact has come through loud and clear: where there is competing rail service, it is possible to negotiate reasonable freight rates. Where there is only single line service, you take what the railroad is willing to give and forget anything else.

In trying to level the playing field between captive shippers and the railroads in order to achieve equitable freight rates, Mr. Chairman, Western Fuels does not wish harm to the railroads. We need them, just as they need us -- for coal provides about 40 percent of the railroads' volume.

Railroading is a wonderful business. It is romantic, exciting and steeped in history. A decent argument can be made that this country's success results from the success of railroads. The early westward expansion and development of the economy rode the rails.

But, conceding these things, we must face the fact that in the 1980s, the railroad business is, essentially, anticompetitive. Mergers and abandonment of lines have limited rail freight service in large sections of the country to a single conglomerate railroad. Railroad managers themselves well understand that the one thing they cannot stand is competition.

They may rail against regulation, but without at least the token regulation they must observe under the generally deregulatory strictures of the Staggers Rail Act, they would automatically lose the exemptions they have from key sections of antitrust law -- exemptions that give them the power they now enjoy of virtually unrestricted power to set rates at a level of their choosing.

We have learned through experience that if it is your misfortune not to have competition for your freight hauling requirements, there is not a lot you can do, given the legal and regulatory environment that exists for railroads today, capped by last year's Supreme Court decision against overturning a 65-year-old Court decision known as the "Keogh Doctrine."

A regulatory agency, the Interstate Commerce Commission (ICC), continues to exist in spite of the Administration's proposal to sunset it. But it has very limited jurisdiction. In what has to be a first in the history of American commercial regulation, the agency can intervene in a rate reasonableness case only at rate levels that by definition produce monopoly returns. To add insult to injury, the ICC as it stands today shows relatively little interest in intervening.

Worse yet, the 1986 Supreme Court decision in Square D Co. and Big D Building Supply Corp. vs Niagara Frontier Tariff Bureau Inc., et al (No. 85-21) essentially says the mere existence of the ICC immunized the railroads from shipper attack under the antitrust laws. These laws, it seems to me, are our natural avenue for relief, given the anticompetitive structure of the railroad industry.

In dealing with captive shippers, railroads have, as a matter of course, engaged in virtually every anticompetitive act proscribed by the antitrust laws -- because they are exempted from being assessed treble damages for such violations, and because shippers cannot sue in federal court for injunctive relief. The Department of Justice can sue -- but rarely does. And a competing railroad can sue and recover damages. But not the railroad's customer, the one who is paying the bills, the representative of the group that suffers the most harm from anticompetitive behavior.

It is not just the present difficulties that shippers face in getting fair rates from monopoly railroads, Mr. Chairman, but indications that captive shippers may face an even more difficult situation in the future. This is contrary to the conventional wisdom -- some of it promoted in a self-serving way by the railroads -- that as existing contracts for coal expire and as utilities and railroads grow more accustomed to negotiating long term transportation contracts, captive shippers will find the costs of rail service more bearable.

A highly regarded expert, L. Leslie Waters, emeritus professor of transportation and business history at the University of Indiana, warned recently that deregulation has spurred rail, motor, and airline carriers toward an "oligopoly in each of the modes." The temporary result has been generally beneficial for users of all three transportation modes, he asserted during the annual "L. L. Waters Annual Transportation Conference" at Bloomington, Indiana. "But" he said,

"shippers had better enjoy it, because the forces of oligopoly will prevail, and even without overt collusion, rates will increase and shippers will be lobbying for reimposition of regulation -- just as some of them are now in the case of the railroads."

Professor Waters did not discuss specifically the problems of captive shippers and spoke favorably of the need for the railroads to increase their earnings -- at the expense of the utility industry, in fact. But his warning should get the attention of all when the shaking out is over from deregulatory efforts, such as the Staggers Act, the surviving carriers will be in an even better position than now to dictate the costs of their service.

We are not petitioning for reregulation or continuation of existing regulation. We believe that competition is the best determinant of fair freight rates, and are convinced that with the two changes in antitrust law proposed by S.443, the forces of competition will prevail.

We and representatives of other industries where the captive shipper problem has been most prevalent do not want to legislate victory for shippers over the railroads. We just want

the opportunity to go to court when we believe a railroad monopoly situation may be causing us economic damages. This legislation will not tell the court how to rule. It will provide access so that in a fair, judicial proceeding, it can be determined if there is anticompetitive action causing damages to shippers which should be halted. If the railroad makes its case that it is not engaging in monopolistic practices, the matter is decided.

Railroads have never, in the hearings we have attended, been able to explain adequately why they think they deserve to have these two exemptions continued while their customers and virtually every other industry and business in the United States has to comply with the Clayton Act, the Sherman Act and other antitrust laws.

But the shippers have testified with documentation in hearings held from 1984 to the present that with the aid of these exemptions, the railroads have exacted excessive freight rates. Testimony has come from representatives of many industries: phosphate producers in Florida, captive to a single railroad; trona producers in southwestern Wyoming, covering perhaps 95 percent of the nation's production of that important mineral, also captive to a single railroad; coal producers in Virginia and Colorado and elsewhere, for example.

Spokesmen for those who oppose this legislation talk of freight rates that in recent years have risen slowly, if at all, or of actual reductions -- "in real dollars" -- in certain agricultural commodities. But they are talking national averages. There is competition in rail transport, either from other railroads or from barges on waterways, in some areas. Where there is no competition, shippers and the consumers are suffering economic hardship.

We believe that bringing the antitrust laws up to date by passing S.443 will put captive shippers on an even footing with the railroads. Removing the opportunity and temptation to engage in noncompetitive actions will provide the opportunity for competition to work, establishing fair freight rates without the need for regulation.

Thank you, Mr. Chairman, for this opportunity.

Senator DECONCINI. Mr. Palmer, thank you. You have made reference to Ms. Gradison's reference to the construction option.

Mr. PALMER. The construction option.

Senator DECONCINI. Yes. And I just wonder how feasible you think that really is. You said in one instance it would have cost \$15 million.

Mr. PALMER. It is a tactic that we have used with some success, but in Illinois it is not a feasible option.

Senator DECONCINI. Have some of your members built rail?

Mr. PALMER. We have looked at it, and in one instance we actually did build four miles of rail in New Mexico.

Senator DECONCINI. In New Mexico?

Mr. PALMER. In New Mexico, yes, sir.

Senator DECONCINI. And was it feasible?

Mr. PALMER. It was feasible and we are actually operating our own train over it.

Senator DECONCINI. So you obviously lowered the price.

Mr. PALMER. We definitely lowered the price.

Senator DECONCINI. And the railroad lost the business.

Mr. PALMER. The railroad lost the business. They are in the room. They are nice people. They would like the business.

Senator DECONCINI. I know who they are, and they are nice people, I grant you that. I am sorry they lost the business.

Mr. PALMER. You have situations like Texas, however. Mr. Chairman, today I note that the lower Colorado River Authority is looking at building perhaps 20 miles of rail to get a competitive access situation. But that is \$25 to \$30 million of investment that they otherwise would not have to make if you had a true competitive environment.

Senator DECONCINI. My next question is, if this bill—not the one we had last year, but this bill—became law, would your members find it feasible to go into the railroad business when necessary to provide competition?

Mr. PALMER. If this legislation were on the books, we would not view this as an automatic charter entitling us to go into the railroad business, but it is surely a circumstance that we would give very heavy consideration to in considering to become a competitor for certain movements as a rail carrier.

Senator DECONCINI. Not just as a captive shipper.

Mr. PALMER. Not as a captive shipper.

Senator DECONCINI. But actually as a competitor.

Mr. PALMER. As a competitor.

Senator DECONCINI. Well, that gives you good reason why the railroads do not like this bill.

Mr. PALMER. I think it is one of the reasons, Mr. Chairman. And I also happen to believe in competition, and things that tend to open the market up and I think this legislation would do it. It would not, as I say, give you an automatic entitlement to a market presence, but I think it would go towards that end, or to be encouraged because of the benefits for the economic areas where we all do business, the benefits that are there from competition.

Senator DECONCINI. I, like you, was pleased to hear some of the positive things that Mrs. Gradison had to say regarding Section 16 in the Keogh area that were different from last year. I do not know

if that is because we have changed the draft of the bill or not. But maybe through the education process we all learn something here.

I want to thank you very much for your testimony and the time that you folks have put in in trying to get Congress to respond to this.

[Response to written questions:]

QUESTIONS FOR FRED PALMER
GENERAL MANAGER -- WESTERN FUELS ASSOCIATION, INC.

- 1) YOU HAVE STATED IN YOUR PRE-FILED WRITTEN TESTIMONY THAT YOU ARE ONE OF THE LARGEST SINGLE BUYERS OF COAL FROM THE POWDER RIVER BASIN IN WYOMING. WHAT HAS BEEN YOUR OBSERVATION WITH RESPECT TO THE INCREASED COMPETITION AMONG RAILROADS IN THE POWDER RIVER BASIN AS A RESULT OF THE INTRODUCTION OF THE CHICAGO NORTHWESTERN SPUR? TELL THE COMMITTEE HOW THIS HAS AFFECTED PRICES CHARGED TO PREVIOUSLY CAPTIVE SHIPPERS.

- 2) HOW DOES THAT COMPETITIVE ASPECT NOW WITNESSED IN THE POWDER RIVER BASIN REGARDING THE TRANSPORTATION OF COAL COMPARE TO THE SHIPPING OF TRONA FROM MINES IN SOUTHWEST WYOMING WHERE NO EFFECTIVE RAIL COMPETITION CURRENTLY EXISTS OUTSIDE OF THE TRUCKING INDUSTRY?

ANSWERS OF FREDRICK D. PALMER
GENERAL MANAGER - WESTERN FUELS ASSOCIATION, INC.
TO QUESTIONS OF SENATOR ALAN K. SIMPSON

Answer to Question No. 1:

As Senator Simpson knows, the most reliable -- and telling -- evidence of what competition in the transportation of coal from the Powder River Basin in Wyoming has provided comes from tariff agreements reached between railroads serving that area

and electric generating stations operated by public bodies such as municipal utilities or public power districts because they must make public what they are paying for goods and services.

Three of these are the City Public Service Board of San Antonio, Texas, the Lower Colorado River Authority headquartered at Austin, Texas, and a consortium of investor-owned and consumer-owned utilities headed by Arkansas Power and Light. All have worked out new transportation agreements within the past three years -- after it became clear that the Burlington Northern Railroad's long time monopoly would be challenged in the southern part of the Basin by the Chicago & North Western in combination with the Union Pacific. All three utilities (and others) have greatly reduced the cost of coal delivered to their generating stations.

Beginning in 1976, San Antonio unsuccessfully attempted to secure rail rate relief from the Interstate Commerce Commission for large increases in the Burlington Northern's freight rate over the original planning rate.

Over the years, they watched their rail rates escalate from the original quote of \$7.90 a ton from the Gillette area to San Antonio up to \$27.67 per ton, an escalation of 350%. In late 1984, C&NW track improvements were completed and it gained the right to own jointly with BN and operate over the then new Coal Creek Junction-to-Orin Junction line. Suddenly, there was competition, and what happened?

In competitive bidding for moving additional supplies of coal, the Chicago & North Western-Union Pacific combine bid \$18.75 per ton and got the business. San Antonio electric customers saved \$500-million plus over the life of the contract.

Arkansas Power and Light, seeking bids for delivering coal to a new unit at each of two existing power plants, received proposals from the two railroad combinations noted above and -- since ETSI was still planning to build a coal slurry pipeline at the time, from ETSI. The C&NW-UP combine produced the lowest bid, and the utilities involved obtained savings they estimated over the life of the 20-year contract at more than \$16 billion.

Lower Colorado River Authority's contract was for a smaller amount of coal and for a shorter period of time, but again the savings for its customers in electricity charges was impressive.

Since that first breakthrough, the C&NW has gained the right of access and joint ownership over another 10 miles or so of BN trackage between Coal Creek Junction and Gillette, and can compete on service to three additional major coal mines. Both railroads compete strongly, and coal users benefit from lower prices.

At the Western Fuels 1986 Annual Meeting, Darius Gaskins, President and Chief Executive Officer of the Burlington Northern Railroad, confirmed the impact of competition on coal movements from the Powder River Basin. In his presentation to our Annual Meeting, Mr. Gaskins indicated that a shipper could anticipate coal freight rates of one cent per ton mile in today's competitive environment. For a 1,000 mile movement, this amounts to \$10.00 per ton. When BN had monopoly control over Powder River Basin movements, rates for a 1,000 mile movement approached \$20.00 per ton.

Answer to Question No. 2:

By contrast with the newly developed competitive situation in the Powder River Basin of northeastern Wyoming, we have the monopoly situation in southwestern Wyoming where 90% of the Nation's trona supply is produced. The Union Pacific has the business locked up, and rates for hauling it are not coming down. Quite the contrary, according to testimony presented to the Senate Committee on the Judiciary in 1986.

George T. Mauro, Director of Logistics for the FMC Corporation, testified on behalf of a number of producers and users of trona -- the principle source for soda ash -- banded together under the name, Ad Hoc Committee on Soda Ash Transportation.

The railroad has repeatedly denied many of the trona industry's requests for transportation contracts. Instead, the rate has gone up regularly, while the Union Pacific has cancelled joint rates with other carriers to increase its own profits.

If another railroad could compete, you would see rate reductions comparable to those experienced with coal in the Powder River Basin.

Senator DECONCINI. Mr. Donovan, if you would like to proceed.

Mr. DONOVAN. Thank you, Mr. Chairman.

Senator DECONCINI. Your statement will be printed in full, and if you would summarize it, please.

Mr. DONOVAN. Thank you. I will be very brief.

STATEMENT OF PAUL M. DONOVAN

Mr. DONOVAN. Thank you, Mr. Chairman, for an opportunity to speak on behalf of the Alliance for Railroad Competition. This is a coalition of chemical companies, fertilizer companies, coal companies, agricultural products companies, basically a cross-section of shippers who find themselves most subject to railroad market power. They do not have very many intermodal transportation alternatives.

Rather than simply summarizing my statement, which I think would be wasteful right now, I would like to address a couple of points that I think Mr. Rule raised in his testimony and Mr. Dempsey raised in his.

First of all, this bill, as you know, Mr. Chairman, is extremely limited. It does not do anything to change the substantive law. It simply is a remedy bill. It simply says that a shipper, and in certain cases a competitor, can bring an action to prevent, curtail or punish anti-competitive conduct. That is what it is. It is as simple as the four-line length of it would indicate.

The issue that Mr. Rule talks about about rate reasonableness and conflicts with the Interstate Commerce Commission's jurisdiction and so on simply are not the case. The fact is that if one were to bring an antitrust action as a shipper using this bill, if passed, one would have to establish first that a railroad or railroads engaged in conduct that violated the antitrust laws. That is the first question.

Senator DECONCINI. How big a chore is that?

Mr. DONOVAN. That is a substantial chore. That is a substantial chore. Violations of the antitrust laws, unless you find a smoking gun with a tape recording of the conspiracy are not easy to establish.

Let us assume that you make that difficult showing and you establish a violation of either Section 1 or Section 2 of the Sherman Act. The next issue is, was the price charged as a result of that violation higher than the price that would have been charged had there been no violation. And if it is, you are entitled to damages three times that amount plus your attorney's fees. That is it. That is the way it works in every other line of business in this country, and that is the way it ought to work for railroads.

I agree with Mr. Palmer that if that remedy were available to shippers, and in some cases competitors for injunctive relief, which they cannot get either, then the incidence of railroad market abuse would be significantly lower. We would be in a more competitive environment. And I do not have to tell you, the prod of competition is going to make the railroads more efficient. It is going to reduce cost—not only price, but cost, because of the prod of competition. And the economy in the railroad business will work more efficiently, as it does in other lines of business.

Now in a classic antitrust case, a violation of the antitrust laws—and I do not care whether it is Section 1 or Section 2 for the purposes of this discussion—the Justice Department can bring an action. They can bring an action either criminally or civilly, depending upon the nature of the case.

A competitor, another railroad for example—and the D&H has done this in a suit against Conrail very recently—can bring an action for lost profits; a treble damage action. They cannot bring an injunctive action to stop the damage, but they can bring a treble damage suit. The shipper, the party most directly injured is the only one who cannot bring a suit.

Now how does this work in reality? Let me skip over to Mr. Dempsey. In reality, Mr. Chairman, when there is a real competitive situation, as Mr. Palmer indicated, the railroads negotiate with a shipper and a contract is entered into. And that contract probably is long term and it affects market share for some considerable period of time. That contract while it is filed with the Interstate Commerce Commission is completely exempt from any regulation. That is what happens when there is competition.

When there is no competition, the railroad files a take it or leave it rate with the ICC. That rate, regardless of how the power was acquired to create the monopoly, or to maintain the monopoly, or to eliminate the competition, simply because the rate is filed with the Commission is immune from treble damage action.

Now that is a situation that simply cannot remain. The fact is when there is competition, they do not have to be immune from the antitrust laws. And when they eliminate competition or monopolize, they file their tariff with the ICC and they are immune from treble damages. That is the bottom line. A situation, that as you know Mr. Chairman, based upon your efforts over the last two or three years, makes no sense.

The issue of private taking, or taking of private property, I cannot leave that. That is just too good. The railroads have acquired their trackage in either one of two ways. Either the government gave it to them in the land grants that you are painfully familiar with, or the railroads acquired it through eminent domain. The railroads in every state in this land have the right to acquire property and pay for it. But they can seize the property.

Now when a shipper comes along and says under the antitrust laws, I want to share in that property and I will pay you what it is worth to share in the use of that property, rather than duplicate it and waste the money necessary to create an unnecessary second system. I want to share that, and I will pay you full value for it, the railroads scream, wait a minute, you are taking my private property. The fact is, that will not wash, Mr. Chairman.

The railroads cannot maintain a monopoly through control of an essential facility, and should not be permitted to do that any more than AT&T should, or any more than in the Terminal Railroad situation in St. Louis which was enjoined when the government brought the action. That simply should not continue.

One more thing before I leave Mr. Rule, and this will conclude my remarks. Mr. Rule in a question that you posed about the Terminal Railroad case seemed to indicate, at least to my ear, that the Justice Department is not about to enjoin or try to enjoin any mo-

nopoly situation. That puts in bold relief the requirement or the necessity that a shipper be able to protect himself, because it becomes very clear that the Justice Department is not going to.

Thank you for your time and for the opportunity to address my remarks to the subcommittee.

[Statement follows:]

BEFORE THE
SUBCOMMITTEE ON ANTITRUST,
MONOPOLIES AND BUSINESS RIGHTS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

HEARINGS ON S. 443
CLAYTON ACT AMENDMENTS OF 1987
MAY 13, 1987

TESTIMONY OF PAUL M. DONOVAN

Paul M. Donovan

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Dated: May 13, 1987

Mr. Chairman, members of the Subcommittee, my name is Paul M. Donovan. Thank you for the opportunity to testify, on behalf of the Alliance for Railroad Competition, in support of of S. 443, the Clayton Act Amendments of 1987. It is our belief that passage of this bill will provide a remedy to shippers in situations where railroads exercise unlawful market power. This would be accomplished not through reregulation or the creation of a new cause of action, but by allowing our existing antitrust laws to apply to railroads in the same way as they govern all other American business.

I. Summary of the Bill.

This bill is designed to clarify that the provisions of the Sherman Act, most particularly the monopolization law contained in Section 2 of the Sherman Act (15 U.S.C. § 2), will be applicable whenever a rail carrier that controls the only rail facility serving a shipper or receiver unreasonably denies to a shipper or competing rail carrier access over that facility with the effect of monopolizing the relevant transportation market.

The bill accomplishes this goal in two, interrelated ways. First, the bill eliminates the proviso in Section 16 of the Clayton Act (15 U.S.C. Section 26)--the section which confers equitable jurisdiction on the federal district courts in antitrust cases--that in suits by private plaintiffs

injunctions are prohibited "against any common carrier . . . in respect of any matter subject to the regulation, supervision or other jurisdiction of the Interstate Commerce Commission." Second, the bill legislatively overturns the Keogh case^{1/} and its progeny, which stand for the proposition that a shipper may not recover damages in an antitrust civil action against a railroad based on a showing that the railroad's published tariff would have been lower but for the existence of conduct in violation of the antitrust laws.

The bill thus creates no new antitrust remedy or cause of action. Rather, the bill is designed to remove the two barriers to application to the railroad industry of Sections 1 and 2 of the Sherman Act.^{2/} The effective inapplicability of antitrust law to the railroad industry is a result of the combined force of Clayton Act Section 16 and Keogh--remnants of an outmoded and largely repealed regulatory scheme. This bill would permit private parties to resort to antitrust law whenever they have been injured by unlawful combinations or conspiracies in violation of Section 1 of the Sherman Act, or unlawful monopolization in violation of Section 2.

1/ Keogh v. Chicago & Northwestern Ry. Co., 260 U.S. 156 (1922).

2/ The thrust of the bill thus differs from S. 447, "The Railroad Antimonopoly Act" introduced during the 99th Congress. S. 447 actually would have created a new, railroad-specific antitrust cause of action.

II. Underlying Legal Theories.

It seems unnecessary to discuss the application of Section 1 to railroads. Price fixing and other horizontal activities that are unlawful under Section 1 should be the subject of shipper damage suits given today's unregulated railroad industry. Recently, the Justice Department took this position in the Square D case.^{3/} The application of Section 2, however, requires a more complete examination.

The Supreme Court holds that illegal monopolization consists of two elements:

- (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power. . . .

United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

Monopoly power, defined as "the power to control prices or exclude competition," United States v. du Pont de Nemours & Co., 351 U.S. 377, 392 (1955) (the du Pont case), ordinarily may be inferred from a business' predominant share of the relevant market. Grinnell Corp., supra at 571. Such power also may be inferred from the ability of a firm, such as a

^{3/} See, footnote 10 infra.

railroad, to control rail rates and related charges for traffic through its facilities. See, generally du Pont, supra at 392 (price and competition are "intimately intertwined" and it is "inconceivable that price could be controlled without power over competition or vice versa").

The mere fact that a firm has monopoly power does not prove the offense of monopolization. It must also be shown that the firm used its monopoly power to foreclose competition, gain a competitive advantage, or destroy a competitor. United States v. Griffith, 334 U.S. 100, 107 (1948). Thus, even if a firm innocently acquires monopoly power (because of superior skill, foresight and industry or superior product, business acumen or historic accident) it may not use that power to prevent or impede competition. Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 274 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980). Similarly, a firm may not use its market position as a lever to create -- or attempt to create -- a monopoly in another market. Id. at 275.

While a business normally is free to deal with whomever it pleases, the law is well-established that a business may not refuse to deal with another business with the intent or purpose of creating or maintaining a monopoly. The Supreme Court has long recognized that "[i]n the absence of any

purpose to create or maintain a monopoly, the [Sherman] act does not restrict the long-recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal" United States v. Colgate & Co., 250 U.S. 300, 307 (1919).

There are two conceptually similar lines of cases which impose a duty to deal upon a monopolist. The first is an "intent" test which originated from the dicta in the Colgate case cited above. Under the intent test, a refusal to deal for legitimate business purposes does not violate Section 2 even though other parties may have been harmed as a result. Homefinders of America, Inc. v. Providence Journal Co., 621 F.2d 441, 443 (1st Cir. 1980)[defendant newspaper did not violate Section 2 by refusing to print misleading advertising even though refusal led to plaintiff's cessation of business]; International Railways of Central America v. United Brands Co., 532 F.2d 231 (2d Cir.), cert. denied, 429 U.S. 835 (1976)[defendant banana exporter did not violate Section 2 by discontinuing unprofitable Guatamalan operations despite harm to railroads that had handled Guatamalan bananas].

However, a refusal to deal for the intent or purpose of creating or maintaining a monopoly is a violation of Section 2. Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927)[defendant, who had monopoly power over whole-

sale market for photographic supplies and wanted to take over retail distribution as well, violated Section 2 by refusing to sell photographic supplies at wholesale prices to a distributor who refused to let defendant buy him out]; Lorain Journal v. United States, 342 U.S. 143 (1951)[defendant newspaper violated Section 2 by refusing to accept advertisements from customers who advertised with competing radio station]; Aspen Skiing Co. v. Aspen Highlands Skiing Corp., ___ U.S. ___, 86 L. Ed 2d 467 (1985)[defendant ski resort operator violated Section 2 by refusing to continue joint marketing arrangement with a competitor where refusal was not for legitimate business reasons but for purpose injuring the competitor].

The second line of cases regarding refusals to deal involves the essential facilities or bottleneck doctrine, which requires that a business that controls a scarce facility must give competitors reasonable access to it. The case law sets forth four elements necessary to establish liability under the essential facilities doctrine:

- (1) control of the essential facility by a monopolist; (2) a competitor's inability to duplicate the essential facility; (3) the denial of use of the facility to a competitor; and (4) the feasibility of providing the facility.

MCI Communications Corp. v. AT&T Co. 708 F.2d 1081, 1132-33 (7th Cir.), cert. denied, 464 U.S. 891 (1983)(citations

omitted). A facility need not be indispensable in order to be considered "essential." A facility is deemed essential "if duplication of the facility would be economically infeasible and if denial of its use inflicts a severe handicap on potential entrants." Hecht v. Pro-Football, Inc., 570 F.2d 982, 992-93 (D.C. Cir. 1977), cert. denied, 436 U.S. 956 (1978)(citations omitted). On the other hand, there is a major limitation: a court will not order the facility to be shared "if such sharing would be impractical or would inhibit the defendant's ability to serve its customers adequately." Id. at 992-93. If no "legitimate business or technical reason" is shown for denying access, access will be compelled. MCI Communications Corp., supra at 1133. See also, Gamco, Inc. v. Providence Fruit and Produce Company, 194 F.2d 484, 487-88 (1st Cir. 1952), cert. denied, 344 U.S. 817 (1952)[defendant produce companies could have denied access to their building, which was held to be an essential facility, if the reason for denial had been because of limited space or applicant's financial unsoundness].

The essential facilities doctrine has been applied by the courts to impose an obligation on a monopolist to make an "essential facility" available to competitors in various circumstances. United States v. Terminal Railroad Association, 224 U.S. 383 (1912)[defendant railroad companies jointly owning a terminal facility that was the only feasible

access to city from the west required to make facility available to non-proprietor railroads on non-discriminatory reasonable terms]; Hecht v. Pro-Football, Inc., 570 F.2d 982 (D.C. Cir. 1977)[trial court erred by not giving instruction on the essential facilities doctrine where plaintiff football promoters sought to overturn restrictive covenant in lease limiting use of the only stadium in city to established football team]; MCI Communications v. AT&T, 708 F.2d 1081 (7th Cir.), cert. denied, 464 U.S. 891 (1983)[defendant communication carrier with monopoly power forced to grant competitor access to interconnections which were essential to the competitor's operations].

The "intent" test and the essential facilities doctrine do not fit neatly into two perfectly separate categories. In fact, there is a great deal of overlap between the two.^{4/} In general terms it may be stated that the intent test focuses on the intent and competitive effect of the refusal to deal rather than on whether the facility itself is "essential." See, e.g. Aspen Highlands Skiing Corp. v. Aspen

^{4/} The two types of theories may apply in a number of different factual contexts. A monopolist may use monopoly power in one market to distort competition in another market by refusing to deal. United States v. Griffith, 334 U.S. 100 (1948). A monopolist may refuse to deal with customers who deal with its competitors. Lorain Journal, supra. A competitor or group of competitors may deny another competitor access to an essential facility. United States v. Terminal R.R. Assn., supra; MCI, supra. A monopolist seeking to vertically integrate may use its monopoly power in the whole-sale market to obtain or maintain a monopoly in the retail market. Eastman Kodak, supra; Poster Exch. Inc. v. Nat'l Screen Serv. Corp., 431 F.2d 334 (5th Cir. 1970), cert. denied, 401 U.S. 912 (1971); Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

Skiing Co., 738 F.2d 1509 (10th Cir. 1984), aff'd, ___ U.S. ___, 86 L. Ed 2d 467 (1985). Both the intent test and the essential facilities doctrine will be factors to be considered in railroad cases under this bill when impediments to antitrust relief against railroads are lifted.

III. Need for Legislation

In hearings before the full Senate Judiciary Committee both last year and the year before, numerous witnesses have presented substantial evidence that in many circumstances high rail rates result from the abuse of market power. In addition, testimony was presented that bottleneck situations exist in some areas.

Rail carriers may use the monopoly power flowing from their ownership of facilities to extend that power into another market--the market for providing transportation services. If such a rail carrier, without a "legitimate business or technical reason" denies third parties a right of access to its facilities, Section 2 would certainly be violated if the denial results in prices, rates, or other conditions of service that could not have been established if effective competition existed. Thus, it readily can be seen that repealing the Section 16 proviso and the Keogh doctrine will insure that persons injured by a denial of access for purpose of maintaining supra-competitive rates have a remedy under Section 2.

It should be reemphasized that it is not the existence of monopoly power itself which causes the Section 2 violation. Rather, it is the willful exercise of that power through the denial of access in order to protect supra-competitive prices, rates or conditions of service. Railroads have a right to charge different prices for their services, the so-called "differential" pricing recognized by the Interstate Commerce Commission and the courts. The mere fact that a railroad has monopoly power or charges a supra-competitive rate would not, standing alone, constitute a violation of Section 2. However, a denial of access in order to protect that supra-competitive rate would be an action to further or maintain the railroad's monopoly power in violation of Section 2. 5/ This bill is designed to eliminate existing impediments to the application of these antitrust principles to the rail industry. The elimination of the Clayton Act Section 16 proviso and the Keogh doctrine should accomplish this result.

5/ It will also be recognized that this bill as drafted will not change the market definition analysis conducted in Section 2 proceedings. Such a market analysis in the context of a railroad proceeding would include an examination of intermodal competition, geographic competition, and any other recognizable forms of competition.

Originally the Section 16 proviso and Keogh represented a conscious policy decision. Through the Interstate Commerce Act (49 U.S. C. Section 10101 et seq.) the railroads already were subject to a pervasive regulatory scheme by the time the Sherman Act was enacted. There were, of course, significant differences between the application by the Interstate Commerce Commission of the Interstate Commerce Act to the railroad industry and the application by the federal courts of the Sherman Act to unregulated industry. Nevertheless, it was recognized by both Congress and the federal courts that full-scale application of the antitrust laws to a heavily regulated industry would be unnecessary and inconsistent. Hence, there came the enactment of the Section 16 proviso and the judicial creation--never altered by Congress--of the Keogh doctrine.

In recent years, however, the pervasive regulatory scheme governing railroads was radically altered by the enactment of the 4R-Act in 1976 and Staggers Rail Act in 1980. 6/ The ICC lost its jurisdiction over all but those

6/ The Railroad Revitalization Recovery and Reform Act of 1976, Pub. L. 94-210, 90 Stat. 31; the Staggers Rail Act of 1980, Pub. L. 96-448, 94 Stat. 1895. Both the 4-R and Staggers Acts directly amended the Interstate Commerce Act.

rail rates deemed to be the result of a carrier's market dominance. 7/ The Commission also was authorized to exempt major areas of rail transportation, 8/ a step it has taken on numerous occasions. Perhaps most significant of all, section 203 of the Staggers Act 9/ authorized railroads and shippers to execute confidential rail transportation contracts. Such contracts are almost entirely free from ICC oversight and once they become effective the underlying transportation is unregulated.

Thus, railroads increasingly have been freed from regulatory constraints and now operate in much the same manner as

7/ 49 U.S.C. §§ 10701a, 10709.

8/ 49 U.S.C. § 10505.

9/ 49 U.S.C. § 10713.

-13-

unregulated industries in the general economy. The primary difference is that the railroad industry, due to the Section 16 proviso and Keogh, remains largely free from scrutiny under Section 2 of the Sherman Act.

Despite the substantial deregulation of the rail industry, the Section 16 proviso and Keogh continue to apply 10/ because the ICC retains minimal regulatory authority over railroad activity. Today railroads must continue to file

10/ By the late 1970s many commentators were calling into question the continued applicability of Keogh in a deregulatory environment. This trend of thinking became even more pronounced following the passage of the Staggers Act in 1980. However, all such doubts about Keogh's continued applicability--as opposed to its merit as a matter of policy-- were laid to rest by the Supreme Court last year. In Square D Company v. Niagara Frontier Tariff Bureau, 476 U.S. ___, 90 L.Ed 2d 413, 106 S.Ct. ___, (1986), the Court reaffirmed Keogh. While recognizing that Keogh might no longer make sense, considerations of stare decisis led the Court to state that "[i]f there is to be an overruling of the Keogh, it must come from Congress, rather than from this Court." 90 L.Ed 2d at 426.

public tariffs, from whose terms they may not vary. 11/ In addition, the ICC retains, in certain limited circumstances, jurisdiction over inter-carrier activity such as joint rates, voluntary trackage rights and mandatory reciprocal switching. 12/ This residual authority is not nearly as extensive as that of a federal district court applying antitrust principles in a civil action under Section 2 of the Sherman Act. However, the existence of this residual authority is sufficient to prevent a private plaintiff from effectively seeking relief under the antitrust laws.

11/ 49 U.S.C. §§ 10761, 10762.

12/ 49 U.S.C. §§ 10705, 11103.

IV. Conclusion

Given the large-scale deregulation that has taken place, whatever the ICC's residual authority, retention of both the Clayton Act Section 16 proviso or Keogh is a regulatory anomaly which this bill is intended to eliminate. With the Section 16 proviso and Keogh repealed, a federal district court sitting over a Sherman Act Section 2 case involving a defendant railroad will be able to exercise its full legal and equitable jurisdiction without the need to defer either to the exclusive or primary jurisdiction of the ICC. The court will, for example, be able to grant damages or mandate access if the plaintiff shows that the defendant controls the only rail facility serving a shipper or receiver and denies access to that facility in order to protect and maintain a supra-competitive rate structure.

Once again, I thank the Subcommittee for the opportunity to submit this testimony.

Senator DECONCINI. Mr. Donovan, thank you. We have heard a great deal about the doctrine of primary administrative jurisdiction. Do you feel that that doctrine will present a problem or lead to a dual jurisdiction as was pointed out by Mr. Rule between the courts and the ICC if this bill would pass?

Mr. DONOVAN. No, I do not, Mr. Chairman. And the reason for that is really the reason that I started out my remarks with.

The fact that a rate is reasonable or unreasonable within the meaning of the Interstate Commerce Act is wholly immaterial. If, for example—and this is the way it would have to happen—if a shipper felt that the rate he was paying was the result of unlawfully acquired or maintained monopoly power and he went to the antitrust courts and said, they violated the Sherman Act and I want damages, the issue of whether that rate is reasonable under the Interstate Commerce Act would never come to play.

Stated differently, if the rate being charged was the result of a lawfully acquired market power, then the forum to determine whether it is reasonable or not is, in fact, the Interstate Commerce Commission, and it should be. The antitrust courts have no play in that.

Senator DECONCINI. That would stay just like it is.

Mr. DONOVAN. That is it. And I think the district court in the D&H case, which I referred to, against Conrail, addressed that very point. And said that even though all the actions of Conrail in monopolizing may have been lawful under the Interstate Commerce Act, the totality of their actions might still constitute an antitrust violation. And the court would look at that without referring it to the ICC.

So, no, I do not think it is a problem.

Senator DECONCINI. Were you here when Ms. Gradison testified?

Mr. DONOVAN. I was, sir.

Senator DECONCINI. She went through a preliminary part of her statement, or the first part of her statement, which I was somewhat impressed with compared to what we have seen before. You have practiced both before the ICC and done litigation in courts. Do you have an opinion as to whether one or the other is more complicated or more involved? And which one takes the longer period of time?

Mr. DONOVAN. I do not think it is easy to make a statement on that, except to say that if you have got a lawsuit with two parties and there is a great deal of money on the table, those two parties are going to do a lot to extend that litigation to their own best interest.

Now, Ms. Gradison had before her a list of who-shot-John, as I believe she called it, and I am sure those are motions, cross-motions, discovery depositions and so on and so forth. That kind of thing with the kind of money that is involved in that lawsuit will occur in any litigation.

I have tried cases in the Federal Energy Regulatory Commission that took years, the ICC that has taken years, and the antitrust courts in some cases take years. However, as a general matter, because of the treble damage club, the fact is that antitrust suits tend to settle much earlier than administrative cases where the best you can hope for is to break even.

Senator DECONCINI. Gentlemen, thank you very much. I have a few questions that we will submit to you.

I want to thank all the witnesses. It was very helpful today. And I want to thank again Senator Metzenbaum for permitting us to have this hearing.

The committee will stand in recess subject to the call of the chairman.

[Whereupon, at 3:44 p.m., the subcommittee hearing was concluded.]

APPENDIX

STATEMENT OF THE REGULAR COMMON CARRIER CONFERENCE

HEARINGS ON S. 443 CLAYTON ACT AMENDMENTS OF 1987

I. INTRODUCTION

Mr. Chairman and members of the Senate Judiciary Committee, the Regular Common Carrier Conference appreciates this opportunity to submit this statement expressing the trucking industry's position on S. 443. That bill would amend the antitrust laws, and in particular the Clayton Act, to allow a shipper to recover damages and obtain injunctive relief against rail carriers whose rates are subject to the jurisdiction of the Interstate Commerce Commission (ICC or Commission). In short, this bill would eliminate for the railroad industry the so-called "Keogh" or "filed rate" doctrine which precludes law suits by shippers for damages under the antitrust laws when the rate has been filed with the Commission.

II. IDENTIFICATION

The Regular Common Carrier Conference (RCCC) is the national trade association for the trucking industry which represents approximately 500 trucking companies that transport general commodities throughout

the United States under operating authority granted by the Commission. These trucking companies operate principally as motor common carriers transporting truckload and less-than-truckload shipments for shippers under rates on file with the Commission. The RCCC trucking companies serve the needs of a substantial portion of the general freight shippers and receivers throughout the country. As regulated motor carriers, they operate under the statutory rate and tariff provisions in the Interstate Commerce Act.

III. SUMMARY OF POSITION

RCCC recognizes that this bill, S. 443, only applies to the railroad industry, and we will let the rail industry present their own position on the matter. However, RCCC steadfastly opposes any amendment to the bill which would eliminate the filed rate doctrine for the trucking industry. As will be discussed in more detail later, our position is based on three major reasons.

First, the shipping public presently enjoys under the Interstate Commerce Act vigorous price and service competition within the trucking industry. With relatively open entry into the trucking industry, the shippers are not and cannot be held captive by an individual trucking company. Indeed, it is a buyer's market in the trucking industry.

Second, the Interstate Commerce Act provides a panoply of remedial procedures for shippers who believe they are being subjected to unreasonably high rates, discriminatory treatment, or unreasonable and unfair practices. The ICC has the authority to investigate, suspend, cancel, and enjoin such unlawful rates. Reparations or actual damages

can be awarded to an injured shipper. In fact, the shipper's pervasive rights and remedies under the Interstate Commerce Act are coextensive with those under the antitrust laws, except for the treble damage provision. This is the basic reason for the Keogh doctrine which confines the shippers to the Interstate Commerce Act.

Finally, while the trucking industry recognizes that the current regulatory system, as administered, is not perfect, the solution is not to expose carriers to antitrust liability. Rather, if Congress finds abuses in the current system, it should make changes in the Interstate Commerce Act, tailored to the particular mode and practice. Moreover, Congress should take a more active role in the appointment of ICC Commissioners and oversight of their activities to ensure compliance with the laws.

IV. STATEMENT OF POSITION

It is the understanding of RCCC that this bill is designed to address the concern of certain utilities and other shippers of bulk commodities who are heavily reliant upon the railroads for transportation. These shippers argue that they are captive to the rail industry which allegedly has abused its market power by imposing unreasonably high rates. To remedy this situation, the bill proposes to make rail carriers subject to the antitrust laws by eliminating the Keogh doctrine.

RCCE is not familiar with the specific facts and circumstances surrounding this controversy between some shippers and the railroad industry. Therefore, it would be inappropriate to comment on the specific issues underlying the bill.

Instead, RCCC will discuss why the filed rate doctrine should not be eliminated for the trucking industry.

A. The Trucking Industry
Is Highly Competitive

The for-hire regulated trucking industry is characterized today by vigorous rate and service competition among carriers in all segments and all regions of the country. This highly competitive environment is due in significant measure to the changes Congress made through the Motor Carrier Act of 1980. The 1980 legislation made it easier to obtain authority from the ICC to operate in interstate commerce. As implemented by the Commission, the focus is now on whether the applicant has the requisite safety and financial fitness to operate on our highways. With relatively open entry, the number of motor carriers who have entered the business for the first time or expanded their existing business into new markets has increased dramatically. For example in 1980, there were 18,045 regulated motor carriers. By 1985, the number had risen to 33,283.

It is generally accepted that the trucking industry, and especially the truckload segment, has low economic barriers to entry.^{1/} An individual who is able to obtain the financing to purchase or lease a truck and to purchase insurance can enter the truckload industry. The

^{1/} A truckload motor carrier is one who transports a trailer loaded with the cargo belonging to one shipper or receiver from origin to destination. In contrast, an LTL carrier transports in its trailers cargo belonging to more than one shipper or receiver. Through a network of terminals it picks up many small lots which then are consolidated into a trailer at a terminal, then transported to another terminal where the cargo is unconsolidated and distributed to various receivers.

costs associated with establishing a less-than-truckload (LTL) operation are substantially greater because it requires a significant amount of equipment and the establishment of terminals for consolidating and unconsolidating cargo. However, even the market structure for the LTL trucking industry has recently been found by the General Accounting Office, the U.S. Department of Justice, and the ICC to be relatively open and unconcentrated when compared to other industries.^{2/} Accordingly, the trucking industry is not susceptible to monopoly or oligopoly pricing. Shippers cannot be held captive by an individual trucking company because of the numerous competitors in the business.^{3/}

In fact, it is currently a buyer's market in the trucking industry with widespread rate discounting and service operations. This vigorous pricing is reflected in the slim profit margins which the industry has returned over the past five years. During that period, the profit margin for the regulated trucking industry has ranged from a low of .77 percent in 1981 to a high of 2.24 percent in 1984. This means that the industry only earned between less than 1 cent to 2-1/4 cents on a dollar of revenue. The motor carriers' financial performance compares unfavorably with other industries in general.

Moreover, the trucking industry has experienced record bankruptcies as the number of competitors dramatically increased while the actual tonnage declined during the period.

^{2/} General Accounting Office report to Congressional Requesters "Trucking Regulation - Price Competition and the Market Structure in the Trucking Industry," February, 1987.

^{3/} In addition to competition within the regulated trucking industry, for-hire carriers face rate and service competition from unregulated private carriers, brokers, freight forwarders, and shippers' associations.

Since the fundamental purpose of this bill is to correct a perceived lack of competition in the railroad industry, it has no application to the trucking industry.

B. The Interstate Commerce Act Provides
Adequate Protections For The Shippers

Since 1935, for-hire trucking companies transporting goods in interstate commerce have been regulated under the Interstate Commerce Act. That statute provides a comprehensive regulatory system designed to promote a sound, efficient, and competitive trucking industry. Congress has on several occasions -- most recently in 1980 -- reevaluated and revised the regulatory structure to meet the present transportation needs of the country.

The statute, as amended, carefully establishes the rights, duties, and remedies for shippers and motor carriers. It imposes an obligation on motor common carriers to provide nondiscriminatory rates and service to shippers.^{4/} The rates charged shippers must be reasonable.^{5/} In other words, a motor carrier cannot charge an unreasonably high rate for its service. The statute also protects shippers from carriers who engage in fraudulent and deceptive practices. For example, if a carrier negotiates a rate with a shipper, but fails to honor it, the ICC is empowered to declare such a practice as unlawful.^{6/} Moreover, the shipping public receives under the statute special protections for their goods not found in other federal laws.

^{4/} 49 U.S.C. §10741(b)

^{5/} 49 U.S.C. §10701

^{6/} Id.; see also, Ex Parte No. MC-177, National Industrial Transportation League - Petition To Institute Rulemaking On Negotiated Motor Carrier Rates, (October 29, 1986).

The Carmack Amendment to the statute makes the motor carriers liable for the full value of the lost or damaged cargo and it limits the defenses that a carrier has against a shipper's claim for recovery.^{7/}

The cornerstone for protecting and enforcing these provisions is the requirement that motor common carriers publish and adhere to their rates in a tariff on file with the Commission.^{8/} The tariff rate is the legal rate binding of the motor carrier and shipper, until it is found unlawful by the Commission.

A shipper who believes it has been subject to an unlawful rate or practice can file a protest or complaint^{9/} with the agency. The ICC has the general authority to investigate, suspend, and cancel an unlawful rate.^{10/} Moreover, reparations or damages can be awarded by a court to a shipper who has been injured by unlawful motor carrier conduct.^{11/}

The rights and remedies for shippers under the Interstate Commerce Act are comprehensive and coextensive with those afforded under the antitrust laws, with the exception of the statutory right to treble damages and attorneys' fees. Importantly, however, the Interstate Commerce Act has been tailored over the years to the particular operations and needs of the shippers and trucking industry.

The requirement that motor common carriers file and adhere to rates in tariffs, in combination with the pervasive rate regulatory system entrusted to the ICC, provide the basis for the "filed rate" or "Keogh" doctrine.

^{7/} 49 U.S.C. §11707

^{8/} 49 U.S.C. §§10761, 10762

^{9/} 49 U.S.C. §11701(b)

^{10/} 49 U.S.C. §11701(a)

^{11/} 49 U.S.C. §10705(a)(3)

That doctrine prohibits shippers from seeking damages from common carriers under the antitrust laws when the basis of their complaint involves a rate on file with the ICC. This doctrine was first enunciated by the United States Supreme Court in 1922 in the Keogh case^{12/} from which it derives its name.

The rationale for the Keogh doctrine of not subjecting common carriers to additional liability under the antitrust laws is obvious. Congress already created a comprehensive system of rights and remedies for shippers under the Interstate Commerce Act. Thus, there was no reason to expose carriers to additional, and possibly conflicting, duties under the antitrust laws.

To ensure nondiscriminatory and reasonable treatment, the legal rights of motor carriers and shippers are measured by the tariff rate. A shipper which believes it has been wronged, of course, has the right to request that the ICC declare the rate unlawful and remedy the situation. However, it is the ICC which has the authority to adjudicate disputes under the Interstate Commerce Act, rather than the courts under the antitrust laws.

The Keogh doctrine has existed for over half a century. In 1986, it was once again affirmed by the United States Supreme Court.^{13/} It should not now be disturbed by Congress. There is no need to expose motor carriers to treble damages under the antitrust laws by eliminating the filed rate doctrine. The Interstate Commerce Act adequately protects the interests of the shipping public in their transactions with the trucking industry.

^{12/} Keogh v. Chicago & Northwestern R. Co., 260 U.S. 156 (1922).

^{13/} Square D Company et al. v. Niagara Frontier Tariff Bureau, ____ U.S. ____ (1986).

C. Any Statutory Changes Should Be Done
Through The Interstate Commerce Act

Regulatory statutes, such as the Interstate Commerce Act, are by nature compromise legislation. They are designed to accommodate various interests and further broad policy goals which sometimes are conflicting. Consequently, there will be good faith disputes over the statutory goals and regulations. Moreover, there may be a need to occasionally change the statute, particularly if the transportation conditions have changed dramatically. Over the years, Congress has changed the regulatory structure for both the motor carrier and rail industry. In fact, both were comprehensively reevaluated and revised in 1980.

It is also axiomatic that a law is only as good as its administrators. It is fair to say that motor carriers and shippers both have been upset with certain decisions made by the ICC. At the Congressional Oversight Hearings held on the Motor Carrier Act of 1980 all parties have had the opportunity to discuss whether the Act is working and whether the ICC is administering the law properly. RCCC's testimony at those hearings is a matter of record.

RCCC has consistently stated that any problems with the regulatory system should be addressed by reforming the statute, rather than eliminating a system which has worked well for decades. Moreover, it has requested that Congress take an active role in ensuring that the ICC Commissioners comply with the statutory mandate, rather than their political or philosophical beliefs about regulation. It is critical that Congress only appoint ICC Commissioners who demonstrate a knowledge of and a commitment to adhering to the law. For this

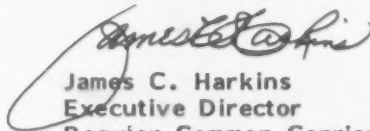
reason, the RCCC endorses the bill, H.R. 75, the "Transport Regulatory Reform Act of 1987," introduced by Congresswoman Helen Bentley which would establish a bipartisan Commission that would assist the President in selecting qualified persons to serve at the ICC and other independent transportation agencies.

RCCC is generally aware that the ICC has initiated proceedings to develop some new railroad rate guidelines for the coal and other industries which could afford shippers with more information and protection. Whether those specific or proposed measures are appropriate and adequate is for Congress, the rail industry, and the shippers to debate.

However, RCCC recommends that if Congress determines that legislative action is necessary, it should be done through an amendment to the Interstate Commerce Act rather than the antitrust laws. Moreover, the change should focus on the particular mode and practice in question.

Accordingly, we respectfully request that this Committee and Congress not eliminate the Keogh doctrine for the trucking industry.

Respectfully submitted,



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Date: May 13, 1987

COMMENTS

ON BEHALF OF

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

The National Industrial Transportation League offers the following comments for the subcommittee's May 13 hearing record on S. 443, Clayton Act Amendments of 1987. We believe that this legislation is consistent with League policy and represents an excellent starting point for making the transition to a railroad industry governed by general business forces, rather than the regulatory requirements of the Interstate Commerce Act.

The League is a voluntary organization of shippers, shippers' associations, boards of trade, chambers of commerce, and other entities concerned with the purchasing of freight transportation services. It is the only nationwide organization representing shippers of all sizes and commodities using all modes of transportation to move their goods in intrastate, interstate, and international commerce. Its members, directly or indirectly, are responsible for the routing of about 80 percent of the nation's commercial freight.

League policy clearly states our members' support for greater application of the antitrust laws to all carriers. Policy B-6 reads: "All carriers should be subject to all existing antitrust laws."

The League believes that application of the antitrust laws, coupled with fostering effective competition throughout the railroad industry, offers the best hope for forging a long-term solution to the problems faced by captive shippers.

As noted in our recent oversight testimony before the House Energy and Commerce Committee's Transportation, Tourism and Hazardous Materials Subcommittee:

"[T]he League does not see any easy way to solve the short-term problems which have been created by shippers' and carriers' differing experiences under the Act. The diversity of opinion is honest and sincere, and has very real marketplace consequences for its advocates....

"However, there appears to be basic agreement in the shipping community about the long-term trends which should be encouraged and fostered. Our members appear to agree that their interests would best be served in a competitive environment. While opposed to nationalization of the railroads, they do believe that something needs to be done so that the marketplace efficiencies resulting from the entry reforms of the trucking and airline laws can be replicated for the rail industry.

"In trying to more precisely define this solution, two trends become apparent. First, the current mechanisms for encouraging a variety of price and service options must be fostered so that they become available to all rail shippers. This means that there should be greater ICC emphasis on promoting joint rates and routes, reciprocal switching, and trackage rights, where it is practical and can be done without great disruption to the current transportation network....

"Second, the industry should have greater exposure to the current antitrust laws. Given the unique nature of rail ownership, these laws appear to be the only practical alternative to perpetuating the current regulatory system....In applying the antitrust laws, some sort of transition must be provided so that ICC regulation is ended in an orderly manner."

Based on these views, the League believes that S. 443 takes an important first step in moving toward our members' long-term goals in this area. By ending the traditional anomaly which allows the government, but not the affected parties, to take corrective action against anticompetitive behavior, the measure clears the way for aggrieved shippers to have their problems addressed impartially in a court of law.

During the hearing, the Association of American Railroads offered to take to its membership a proposal which would end ICC regulation of the rail industry, and place the nation's railroads under the jurisdiction of the antitrust laws. If such a course of action is pursued, the League would appreciate the opportunity to place such a plan before its membership to assure that the interests of the shipping community are fully addressed.

We look forward to working with you and your staff not only in securing enactment of this legislation, but also in ending the current regulatory system by fostering effective competitive and extending the antitrust laws to the railroad industry.

STATEMENT OF
ARIZONA ELECTRIC POWER COOPERATIVE, INC.

On behalf of itself and its electric ratepayers, Arizona Electric Power Cooperative, Inc. ("AEPCO") of Benson, Arizona appreciates the opportunity to submit this statement for inclusion in the record of testimony taken by the Senate Judiciary Committee's Subcommittee on Antitrust, Monopolies and Business Rights on May 13, 1987 concerning S.443, the "Clayton Act Amendments of 1987."

AEPCO supports enactment of S.443 as a necessary corollary to the gradual deregulation of railroad rates and services that has taken place throughout the past ten years. As the sphere of regulatory jurisdiction administered by the Interstate Commerce Commission has continued to shrink, railroad customers and competitors have -- by Congressional design and practical necessity -- looked to the antitrust laws for protection from market abusive behavior by railroads operating in deregulated and/or exempt environments. By removing two artificial and anachronistic obstacles to full application of the antitrust laws to the railroad industry, S.443 would provide some substance to that prospective protection, and properly ensure that where rail carriers operate free from regulatory constraints, their actions will be policed by the same set of rules applicable to other service industries.

AEPCO and Its Interest

AEPCO is a rural electric generation and transmission cooperative financed pursuant to the Rural Electrification Act, which engages in the production and transmission of electric power. This power is marketed to consumers in Arizona and California by seven member systems: Anza Electric Cooperative, Inc.; Duncan Valley Electric Cooperative, Inc.; Graham County Electric Cooperative, Inc.; Mohave Electric Cooperative, Inc.; Sulphur Springs Valley Electric Cooperative, Inc.; Trico Electric Cooperative, Inc.; and the City of Mesa, Arizona.

In the twenty-five years since AEPCO was formed, the makeup of its members' service areas has changed substantially.

For many years, the usual areas served by member cooperatives were predominantly agricultural. There were also some small to mid-sized industrial, mining and commercial enterprises which helped to sustain the new communities growing up around highways and rail lines. Beginning in the early 1970's, however, farming and ranching in the members' service areas declined, and contemporaneously, the copper mining industry grew. By 1981, nearly 30% of the power sold by AEPCO member systems went to two such customers: Phelps Dodge Corporation and the Anamax Mining Company.

Prior to the actions of OPEC and the ensuing energy crisis, AEPCO relied exclusively upon natural gas and oil as the boiler fuel used in its electric generation. In the early 1970's, however, following the oil embargo and the national call for increased use of coal by utilities as a substitute for oil and natural gas, AEPCO undertook an ambitious conversion program. Initially, the plan was to build one 100 megawatt coal-fired unit at AEPCO's Apache Generating Station at Cochise, Arizona. When Phelps Dodge announced it would need a full 100Mw for its copper mining operation, however, AEPCO's plans expanded to two 175Mw coal units. These were constructed in 1975-78, at a cost of over \$270 million.

The result of AEPCO's coal conversion effort was the complete displacement of oil and natural gas as a base-load fuel for the generation of electrical power. Today, gas, oil and purchased power play peripheral roles in AEPCO's power production program; coal is, and for the indefinite future will be, the staple fuel at the Apache Station.

AEPCO's dependence on coal has in turn given rise to a dependence on rail service insofar as fuel transportation is concerned. Because of the volumes involved (between 700,000 and 1,000,000 tons per year) and numerous logistical problems (highway weight limits, etc.), motor carriage is effectively ruled out as a potential alternative, and there are no inland waterways or slurry pipelines remotely adjacent to AEPCO's Cochise facility. Since 1978, 100% of the coal burned at the Apache Station has been transported there by rail.

In terms of specific railroads, the Southern Pacific and Atchison, Topeka & Santa Fe have combined to haul almost all of the coal consumed at Cochise. The Southern Pacific is the only rail carrier with lines serving Cochise, and thus has delivered every ton of coal transported to that point. For its part, the Santa Fe is the only rail carrier providing service from the coal producing properties in the Gallup, New Mexico area, the region from which AEPCO has obtained virtually its entire coal supply since 1978 (except for a few, isolated test coal shipments and some early tonnages from Pittsburg & Midway's McKinley Mine near Gallup, all of the coal for the Apache Station has come from the Gallup Mentmore Mine pursuant to a long-term contract between AEPCO and Carbon Coal Company). The confluence of these facts has served to render AEPCO a "captive coal shipper," as the term is used in current rail regulatory parlance.

Since it began shipping coal by rail in 1978, AEPCO has witnessed a steady contraction of the breadth and depth of ICC regulation of railroads. The deregulation of competitive traffic accomplished through the Railroad Revitalization and Regulatory Reform Act of 1976 gave way to the substantial deregulation of captive traffic through the Staggers Rail Act of 1980 (which, among other things, immunized inflation-based rate increases from challenge, guaranteed rate freedom within certain "zones of rate flexibility" and removed all ICC authority over captive rates set at or below specific ratios of revenues to variable costs). Today, the proliferation of private contracts and exemptions, as well as strict jurisdictional rules, have dramatically reduced the scope of the ICC's authority. At the same time, liberal (from a railroad's perspective) agency interpretations of concepts such as revenue-adequacy and "rate reasonableness" have limited the extent to which the ICC can be expected to act even in those areas where it retains its once-extensive power.

Legislative changes and administrative interpretations have led to gaps in the range of regulatory remedies available to shippers and rail carrier competitors in dealing with railroad abuses of their still-enormous market power over certain commodi-

ties. To fill these gaps, shippers and others must be able to look to the antitrust laws -- the standard tool for policing market behavior in interstate commerce. AEPCO's interest, as a captive shipper, in S.443 springs from its belief that for the antitrust laws to effectively fill their role in the new, deregulated rail environment, certain modifications need to be made to the rules governing remedies traditionally available in the rail context.

The Impact of the
Clayton Act Amendments

Notwithstanding the dire claims by opponents of S.443, its enactment will not lead to "double regulation" of the railroads or create new causes of action in favor of shippers or competitors where they do not now exist. Rather, the bill simply would remove two barriers to remedies for substantive violations by railroads of the Sherman Act -- barriers that may have had a legitimate role in the heavily-regulated environment of their inception, but today are outmoded and improperly insulate railroads from the legal consequences of market power abuse.

First, S.443 would repeal the provision in Section 16 of the Clayton Act that prohibits the granting of injunctive relief in favor of a private plaintiff against a rail carrier for violation of the Sherman Act, where the action complained of arguably relates to "any matter subject to the regulation, supervision or other jurisdiction" of the ICC. Second, the legislation would nullify the doctrine enunciated in 1922 in Keogh v. Chicago & Northwestern Ry. Co., whereunder a rail shipper may not recover damages for a civil antitrust violation where those damages would be measured by the difference between a rate level published or assessed by the carrier and the level that would have been paid by the shipper but for the violation. No other changes in existing law are proposed.

When they were initially conceived, Section 16 and Keogh seemed natural companions for the pervasive ICC regulatory jurisdiction already in place. While, to be sure, the Interstate Commerce Act prescribed a statutory scheme separate and distinct

from that envisioned under the Sherman and Clayton Acts, the pattern of regulation was sufficiently pervasive that Congress -- and the courts -- viewed application of both to the same activities redundant and, thus, unnecessary.

Times change, however, and now -- seven years after enactment of the Staggers Rail Act -- the extent of ICC authority over railroad rates and practices currently in effect is but a fraction of that prevailing when Keogh and Section 16 evolved. The introduction of private contracting for rail services, for example, has dramatically altered the landscape. An enormous share of the railroads' high volume traffic now moves under private agreements pursuant to 49 U.S.C. §10713, which have the effect of wholly exempting the subject service from ICC jurisdiction and regulation. Similarly, the ICC's expanded use of its exemption authority under 49 U.S.C. §10505 has freed the railroads on a general scale from regulatory supervision in a number of areas, including the transportation of fresh fruits and vegetables, the handling and use of boxcars, and the establishment of discriminatory rates on short versus long-haul movements.

Even in the ICC's once solid domain of rail rate jurisdiction, statutory and interpretive changes have left rail carriers for the most part free to set and maintain structures of their own choosing. The prohibition against rate discrimination contained in 49 U.S.C. §10741 has been virtually written off the books as a result of the ICC's narrow standards for application of the rule, and the ICC's power to order rail carriers to lower rates to reasonable levels and award reparations to shippers for past overcharges has been restricted to cases where: (a) the rate is higher than the rate in effect on October 1, 1980, plus inflation, and (b) the revenues produced by the rate exceed 180% of the variable costs of providing the service; and (c) the shipper paying the rate has no actual or potential alternatives to the carrier charging the rate. Only after all three hurdles are cleared does the ICC have jurisdiction to decide whether the rate itself is unreasonably high.

The end result is that in the large majority of cases today, rail carriers set and change rates and rate levels without any substantive oversight on the part of the ICC. Yet, because these rate actions are reflected in tariffs or other schedules filed with the agency, Keogh is used to block civil damages -- and Section 16 to preclude injunctive relief -- should it be demonstrated that these unsupervised rate activities implement or reflect the results of anticompetitive conduct otherwise actionable under the Sherman Act. In practical terms, this means that rail carriers may engage in price-fixing conspiracies, market division arrangements, concerted refusals to deal and other actions aimed at new competitive entrants (such as coal slurry pipelines), tying arrangements with mineral-producing affiliates, and other abuses of market power, and unless a federal criminal prosecution is triggered (a rarity), the combination of limited ICC involvement and the effect of Keogh/Section 16 will leave shippers and other adversely affected parties without meaningful recourse.

It is to remedying this growing problem that S.443 is directed. The bill plainly would not set the antitrust courts up in competition with the ICC; the principal area of real concern to shippers where the ICC retains some power -- the establishment of reasonable rate levels -- has never been an area in which actionable antitrust issues arise. It would, however, ensure that where the establishment of rates and rate structures, free of ICC scrutiny, is used in furtherance of a combination or conspiracy in restraint of trade or an effort to unlawfully gain or maintain a monopoly, railroads -- like their deregulated counterparts in other industries -- would be answerable for their conduct under established principles of antitrust jurisprudence.

Litigation Before the ICC Alone
Provides Inadequate Protection For Shippers

Opponents of S.443 argue that railroad shippers and competitors should be content simply to take their complaints of rail market power abuse to the ICC, and should not seek to avail themselves of the options offered other private plaintiffs under

the Sherman Act. There are, however, two fatal flaws to this argument. First, it assumes that the reach of ICC authority -- and the agency's willingness to use it -- is sufficiently broad to offer relief for the types of abuse covered under the anti-trust laws. As shown above, this clearly is no longer the case (if it ever was).

Second, it assumes that where the ICC does retain the power of regulatory oversight (e.g., in the area of rate reasonableness), the remedial process offered by the agency will provide injured parties with reasonably prompt, compensatory relief. AEPCO's own experience in seeking redress from rate levels imposed by the Santa Fe and Southern Pacific coal movements to the Apache Station, however, belies the validity of that assumption.

In 1973, while the generating station was under construction, AEPCO began rail rate "discussions" with the carriers, and in November of that year received a quotation of \$5.80 per ton; a price AEPCO found unreasonable for the 505-mile movement from the coal source to the Apache Station. In 1974, when AEPCO's tonnage projections increased dramatically due to Phelps Dodge's requirements, AEPCO naturally expected that the additional annual volume (some 600,000 tons) would entitle it to a lower rate. To the contrary, however, the carriers raised their quoted rate to \$7.04 per ton. Notably, they never offered any cost-based or other justification for the price hike.

By 1977, scheduled start-up of the new Apache units was fast approaching and negotiations were going nowhere. AEPCO therefore filed a complaint with the Commission under 49 U.S.C. §10707, seeking a rate prescription of \$4.67 per ton. The railroads countered with a demand for an even higher rate of \$8.64, and a notice that they would seek ICC approval of this rate as a "Capital Incentive Rate." Enacted in 1976 as 49 U.S.C. §10729, the Capital Incentive Rate provision of the Interstate Commerce Act prescribed certain rail rate-filing procedures which offered expedited agency consideration of qualifying rates and -- if approval was won -- a five-year prohibition against subsequent challenges.

Congress repealed 49 U.S.C. §10729 in 1980, largely because rail carriers were using it as a weapon rather than a device for implementing shipper-carrier rate agreements, as Congress had intended. One of the pre-1980 victims of the abuse of 49 U.S.C. §10729, however, was AEPCO; in 1977 the Commission approved the \$8.64 demanded by Santa Fe/SP as a Capital Incentive Rate, and subsequently dismissed AEPCO's complaint.

Despite the fact that the \$8.64 rate was enormously profitable (according to AEPCO's evidence, the carriers' full cost of providing the service was close to \$4.00 per ton), the carriers continued to raise the rate through so-called "ex parte" increases approved by the Commission, until it stood at \$12.30 per ton by April, 1980. At this level, AEPCO was paying over \$13 million per year for rail transportation alone.

In May, 1980, AEPCO tried again, and filed a complaint challenging the \$12.30 rate as unlawful to the extent it exceeded the \$8.64 Capital Incentive level. (Actually, AEPCO's evidence showed that a reasonable maximum would have been \$7.83, but the 5-year prohibition in 49 U.S.C. §10729 prevented its going below \$8.64.) After denying a railroad motion to dismiss the complaint on grounds that the entire \$12.30 rate (not just \$8.64) was "protected" by 49 U.S.C. §10729, an ICC Administrative Law Judge found the rate unlawful to the extent it exceeded \$10.88 per ton, and in Docket No. 37437 ordered the carriers to reduce the prevailing rate and pay reparations.

On March 30, 1982, in response to a railroad appeal, the full Commission decided that 49 U.S.C. §10729 did in fact protect the entire \$12.30 rate, and therefore overturned the ALJ's rate order. AEPCO immediately appealed to the U.S. Court of Appeals for the Ninth Circuit. Instead of defending the 1982 decision, however, the Commission reconsidered the matter and, in 1983, finally ruled that 49 U.S.C. §10729 did not protect the AEPCO rate above \$8.64 per ton after all. Docket No. 37437 was reopened, and AEPCO's Ninth Circuit appeal was dismissed as moot. Significantly, however, the ICC did not reinstate the ALJ's decision.

On August 30, 1983, the Commission formally reopened Docket No. 37437. In so doing, the Commission repeated once again the substance of its statement to the Court of Appeals that the protection of former Section 10729 extended only to the base, \$8.64 rate, and did not immunize increases in that rate from attack by AEPCO. Amazingly, however, the ICC then went on to repeat the same erroneous action that had brought AEPCO to court in the first place. Expressing concern "that the capital incentive rate not be eroded by inflation," the Commission stated that while AEPCO could challenge all of the increases taken by the Railroads in the original \$8.64 capital incentive rate, the Commission would not find those increases unreasonable so long as they were limited to "cost recovery." The effect of this restriction was to insulate large portions of the subject increases from attack, as they already had been approved by the Commission as "cost-based" components of general increases before being specifically applied to AEPCO's traffic. The Commission in substance went in two directions at once, acknowledging "that inflation is not an adequate legal basis to preclude challenge to the general rate increases as applied to [AEPCO's rate]," while at the same time ruling in advance that such a challenge would succeed only "[t]o the extent [the] increased rate exceeds cost recovery increases"

Outraged at the legal bait-and-switch which the Commission appeared to be attempting, AEPCO filed a Petition to Reopen with the ICC on September 19, 1983, explaining that the August 30 Order directly contravened the Commission's representations to the Court of Appeals and impermissibly imposed upon AEPCO a maximum reasonable rate standard completely different from that applicable to rate challenges filed by other coal shippers.

While AEPCO's Petition to Reopen languished before the Commission and Docket No. 37437 remained "on hold," the ICC adopted final guidelines for determining maximum reasonable rates on coal shipments in Ex Parte No. 347 (Sub-No. 1), Coal Rate Guidelines -- Nationwide. Under these guidelines, coal rates are to be judged according to standards built on principles of pric-

ing efficiency, "stand-alone" costs of competitive service, and the extent of a rail carrier's "revenue shortfall" as determined under 49 U.S.C. §10704(a). Specifically eschewed as a standard of reasonableness, however, is any form of "strict cost-based" analysis, including, by definition, the type of "standard" enunciated in the Commission's August 30, 1983 Order in Docket No. 37437. Following service of the new guidelines, the Commission issued an omnibus order in all pending coal rate cases -- including AEPCO's -- instructing parties to submit proposed procedural schedules for the handling of their cases under the new guidelines. Acting pursuant to this order, AEPCO consulted with the railroads and submitted a proposed schedule on February 3, 1986. At that time, it also re-urged the relief sought in the Petition to Reopen, which by then had been pending for 2-1/2 years.

On April 10, 1986, the Commission served yet another decision in Docket No. 37437, approving the procedural schedule submitted by AEPCO, but denying the relief requested in its Petition to Reopen. Responding to AEPCO's claim of inconsistencies between the August 30, 1983 decision and the Commission's 1983 representations to the Court of Appeals, the ICC maintained that it had not in fact promised the Court that it "would use any particular rate standard in determining the reasonableness of the rate here." The ICC, with Commissioner Lamboley dissenting, further rationalized denying AEPCO's Petition on grounds that the "legislative intent" behind the Staggers Act's preservation of former Section 10729's five-year base rate immunity would be thwarted if the Commission "allowed inflation to erode the base capital incentive rate." According to the Commission, however, neither this rationale nor its result conflicted with the agency's statement to the Court that "former Section 10729 clearly does not apply" to cost-based general increases, or with its statement to the parties that "inflation is not an adequate legal basis to preclude challenge" to the rate increases at issue.

Once again, AEPCO was forced into court, and on May 8, 1987, the U.S. Court of Appeals for the Ninth Circuit, finding that AEPCO "has suffered the arcane rigors of the regulatory process long enough," vacated the ICC's decision and remanded the

matter for adjudication of AEPCO's rate complaint. Comparing AEPCO's odyssey through the ICC's rate review processes to the fictional litigation depicted in Charles Dickens' Bleak House, the Court concluded:

The ICC has broad discretionary powers, and the scope of review of an ICC rate decision is narrow. Yet the discretion of the Commission must be exercised within prescribed parameters. In [this case] the ICC abused its discretion by (1) failing to abide by representations made before this court in 1983; (2) disregarding prior ICC decisions without an adequate explanation of reasons; and (3) relying on a mistaken interpretation of the applicable statutes.

Thus, almost seven years after filing its complaint against the \$12.30 rate, AEPCO is still before the Commission seeking reparations for the charges that the record -- in the only ruling on the merits made thus far -- shows were unreasonably high.

On May 13, 1987, before this Subcommittee, ICC Chairman Gradison stated that the Commission planned to decide AEPCO's case with finality before Labor Day. Putting aside the fact that such a schedule comes as small solace when the decision is already several years overdue, the fact is that not two weeks later the ICC granted a railroad request to reopen a portion of the case for the submission of yet more evidence. The Chairman's representations notwithstanding, the end plainly is not yet in sight.

An axiom holds that justice delayed is justice denied. AEPCO's is a case in point. To those that urge shippers to rely solely on the ICC's remaining, admittedly narrow regulatory jurisdiction for protection from railroad abuse of market power, AEPCO in response offers the procedural nightmare that is the history of Docket No. 37437.

Conclusion

In its 1986 opinion in Square D Co. v. Niagara Frontier Tariff Bureau, the Supreme Court acknowledged that developments in the law -- particularly since 1976 -- had served to undermine

the theoretical bases for the original ruling in Keogh. Exercising venerable principles of judicial restraint, however, the Court stated that "if there is to be an overruling of the Keogh rule, it must come from Congress, rather than from this Court."

AEPCO submits that the case for abolition of Keogh immunity and modification of Section 16 is persuasive and unequivocal. The tight, comprehensive regulatory scheme prevailing at the time of their inception is a thing of the past, and railroads today operate in a market environment generally free of regulatory scrutiny. If they are to be given the freedoms available to deregulated businesses, they should be subject to the same rules, including specifically the guidelines, standards and sanctions of the Sherman Act.

AEPCO supports the enactment of S.443 as a necessary step to protect the rights of railroad customers and competitors in the modern marketplace, and urges that this Subcommittee act favorably on the bill with all expedition.

STATEMENT OF FRED M. ZITTO
IN BEHALF OF THE
PROCOMPETITIVE RAIL STEERING COMMITTEE

The Procompetitive Rail Steering Committee ("PCRSC") submits this statement to the Subcommittee on Antitrust, Monopolies & Business Rights for consideration in connection with its deliberations on S. 443, The Clayton Act Amendments of 1987.

PCRSC wishes to express its appreciation to the Subcommittee for the opportunity to express its views in support of this proposed legislation, which has as its objective the equal enforcement of the nation's antitrust laws and the maintenance of competitive access to railroad transportation facilities. PCRSC requests that this statement be made a part of the Subcommittee's record in this proceeding.

I. Background and Position of the Procompetitive Rail Steering Committee.

PCRSC is an organization comprised of widely diversified companies throughout the United States which are substantial users of railroad transportation. The following companies are members of PCRSC:

- Amoco Chemicals Company
- Cargill Incorporated
- Chrysler Corporation
- Ethyl Corporation
- FMC Corporation
- ICI Americas, Inc.
- International Minerals and Chemicals Corp.
- International Paper Company
- Libbey-Owens-Ford Company
- Manville Service Corporation
- Olin Corporation
- Owens-Illinois, Inc.
- PPG Industries, Inc.
- Reichhold Chemicals Inc.
- Union Carbide Corporation
- Wyandot Dolomite, Inc.

PCRSC was formed in 1983 by a number of large industrial companies which are tied to the railroads by production facilities designed for rail service and by distribution systems characterized by longdistance, high-volume shipments which generally cannot be transported by truck or intermodal service. The dependence of our members on rail service cannot be altered

without significant increases in capital investment and unacceptably high operating costs. Many of the products shipped by members of PCRSC are fungible, bulk, low-value goods for which rail transportation costs represent a significant percentage of delivered value. Accordingly, the members of our Committee are vitally interested in any legislative measures which will facilitate and promote increased rail-to-rail competition and preserve competitive transportation markets.

II. Intermodal Rail Competition Must Be Preserved and Strengthened.

The members of PCRSC have become increasingly concerned over the last several years about certain ominous trends in the railroad industry. First is the continuing reduction in the number of railroads offering competitive service to the public. Over the last several years, the Interstate Commerce Commission has presided over an unprecedented consolidation of the railroad industry. Today 85 percent of the industries' operating revenues are controlled by only seven railroads.

Moreover, rail mergers continue unabated. A petition is currently pending before the ICC to reopen the Santa Fe-Southern Pacific merger proceeding, which had been previously denied by the ICC as being anticompetitive. Simultaneously, the Union Pacific rail system has filed a merger application to acquire its regional competitor, the Missouri-Kansas-Texas Railway Company. Meanwhile, other "revenue inadequate" railroads such as CSX and Norfolk Southern are acquiring trucking companies, barge carriers, and ocean shipping lines. It is conceivable that by 1990 three or four transcontinental railroads will dominate the nation's commerce. Reduction in rail-to-rail competition is a direct result of the mergers and consolidations approved by the ICC.

Moreover, these mergers create strong incentives on the part of railroads to use their newly consolidated market power to further restrict competition through the cancellation of joint rates with connecting carriers and the termination or monopolistic pricing of reciprocal switching services. In this

fashion, large railroads have restricted competitive routing options available to shippers and have eliminated the ability of smaller regional carriers to participate in competitive joint line movements.

The objective of most joint rate cancellations by large carriers is to divert traffic from joint line routes with connecting carriers to their own single line, long haul, high revenue routes. For example, blanket cancellations of joint routes by Consolidated Rail Corp. in 1981 resulted in the diversion of over \$50 million in freight revenues from Conrail's connecting carriers. As a result of these types of cancellations, it is now common for an originating railroad to participate only in its own long haul routes and to refuse to offer competitive rates with connecting railroads over intermediate junction points. With rare exceptions, the ICC has permitted these cancellations by large railroads to become effective throughout the nation.

Subsequent attempts by various shippers to negotiate combination or proportional rates (in place of joint rates) with cancelling carriers via intermediate junctions, have met with resistance not only from cancelling carriers but also from the connecting railroads. The connecting railroads have been very reluctant to quote rates beyond interchange points which would provide a competitive through rate. The obvious reasons for such reluctance is a fear that if the connecting carrier quotes competitively, it will invite retaliation by the cancelling carrier to quote competitive proportional rates against it which would result in the loss of its own preferred long haul routings. These cancellations and refusals to quote competitive rates have resulted in de facto market allocations and raise serious questions under the antitrust laws.

Significantly, in response to Conrail's July 1981 cancellations, Grand Trunk Western Railroad filed an antitrust suit which it favorably settled in April, 1986. The Delaware and Hudson Railroad Company is presently pursuing a similar antitrust suit against Conrail in the U.S. District Court in Albany, NY.

In the light of these competitive problems, PCRSC believes that every effort must be made to subject the railroads to the full force and effect of the antitrust laws in order to protect and restore competitive rail transportation markets for rail dependent shippers.

III. PCRSC Strongly Supports Passage of the Act.

PCRSC was a strong supporter of the Railroad Antimonopoly Act of 1985, which was considered by your Subcommittee during the 99th Congress. PCRSC participated actively in the various hearings and discussions concerning that legislation and worked diligently to produce an acceptable proposal which would deal effectively with railroad competitive access problems.

S. 443/H.R. 941, as introduced in the 100th Congress, represents an important step forward in making the antitrust laws fully applicable to the railroad industry. In particular, PCRSC strongly supports the availability of injunctive relief for private parties involved in antitrust litigation against railroads. This relief would enable courts in appropriate circumstances to fashion competitive access remedies in response to abusive market conduct by the railroads. The Committee believes that the mere availability of such a remedy would greatly enhance the ability of shippers and regional carriers to resolve competitive access problems with the large railroads.

Finally, as a matter of principle, PCRSC believes that the railroad industry should be subject to the antitrust laws in the same manner as any other competitor in our national economy. For all practical purposes the Staggers Rail Act of 1980, as implemented by the ICC, has eliminated effective ICC oversight of railroad rates and practices. Collective establishment of railroad rates under antitrust immunity provided by

the Reed-Bullwinkle Act has been virtually eliminated. The railroads are permitted to provide rail service and to establish rates under contractual arrangements which are subject to the full force and effect of the antitrust laws.

Nonetheless, railroads are by statute immune from injunctive relief under the antitrust laws and, to the extent that traffic moves under published tariffs, are protected from private treble damage suits by the antiquated and outdated Keogh Doctrine. The Clayton Act Amendments of 1987 would eliminate those "safe havens" for railroads from the antitrust laws. If the railroads desire to conduct their business and price their services in a deregulated, competitive marketplace, they can no longer lay claim to the special status of a regulated industry operating under preferential exemptions from the antitrust laws.

The Procompetitive Rail Steering Committee, therefore, strongly supports the enactment of S. 443/H.R. 941 and urges you to favorably report this bill to the full Committee for its consideration.

Respectfully submitted,

PROCOMPETITIVE RAIL STEERING
COMMITTEE

Fred M. Zitto, President



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Statement of
The Fertilizer Institute
In Support of S. 443
The Clayton Act Amendments of 1987

The Fertilizer Institute* (TFI) submits this statement to the Senate Judiciary Committee in response to the May 13, 1987 Committee Hearing on S. 443. TFI supports the bill. The railroads are a deregulated industry. Thus, they should not enjoy exemptions from the antitrust laws and should have to comply with the same antitrust rules that apply to all other American industries. Furthermore, S. 443 promotes competition -- and competition, within the framework of antitrust principles, is the best regulator of the marketplace.

Over the years, The Fertilizer Institute, on behalf of its member companies, has battled the railroad industry before Congress and at the Interstate Commerce Commission. Why? Forty percent of the farmer price of fertilizer is transportation cost. Fertilizer industry rail transportation costs exceeded \$1 billion in 1986. Throughout its struggle to hold down transportation costs, the fertilizer industry has sought the ability to negotiate on equal terms.

TFI supported deregulation and its members have benefited from many aspects of deregulation. However, without competition, it is difficult to negotiate with railroads. Further, the railroads still benefit from special antitrust exemptions associated with the old regulatory framework. Thus, our members find that negotiating with railroads tends to be more like accepting their terms with little recourse.

The time has come to make clear that the railroads are subject to the antitrust laws. The railroads need to know that if they abuse their market power, shippers can go to court and hold them accountable to the same antitrust standard as other industries. Further, shippers subject to the abuse of railroad monopoly power are entitled to antitrust protection accorded other segments of the economy.

The end result of S. 443 is to promote competition in the railroad industry. There should be few arguments against its enactment.

*TFI is a voluntary, non-profit association whose members represent approximately 95 percent of the domestic fertilizer production in the United States. TFI's membership includes: producers, manufacturers, traders, retail dealers and distributors of fertilizer materials. Its members are major shippers, receivers, and exporters of fertilizer and fertilizer materials and are a vital link in the nation's agriculture system.